

***‘Horses for Courses’: An analysis of equine  
sports regulation and disciplinary procedures  
regarding the non-human athlete***

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### ***Ode to the Horse***

*Where in this wide world can man find nobility without pride,  
friendship without envy or beauty without vanity? Here, where  
grace is laced with muscle, and strength by gentleness  
confined.*

*He serves without servility; he has fought without enmity.  
There is nothing so powerful, nothing less violent, there is  
nothing so quick, nothing more patient.*

*England's past has been borne on his back. All our history is  
his industry; we are his heirs, he our inheritance.*

*The Horse!*

Ronald Duncan (1914-1982)

### ***Prison Notebooks***

*Is it better to work out consciously and critically one's own conception of the world and thus, in  
connection with the labours of one's own brain, choose one's sphere of activity, take an active  
part in the creation of the history of the world, be one's own guide, refusing to accept passively  
and supinely from outside the moulding of one's own personality?*

Antonio Gramsci (1891-1937)



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## **Abstract**

Sports governing bodies and international sports federations are very powerful organisations within their sphere. The governance of these sports has created a hegemony which does not necessarily serve the interests of those engaged in sport (the ‘ruled’), but instead those who ‘rule’ sport. A key part of governance is the disciplinary mechanism and the control of cheating within the promotion of integrity. The central tenet of such governance is the World Anti-Doping Agency (WADA) Code, and separate rules within the same aim is the concept of strict liability, modified to ‘presumed fault’ and is predicated on the concept of human autonomy. The elite sport horse is now socially constructed as a non-human ‘athlete’, as it is no longer a bulk source of power for industry, agriculture, or warfare. However, the contribution that the horse industry makes to the UK leisure economy is considerable at £7bn annually, before associated gambling is even considered. Worldwide, there are more than 80 sports involving horses as participants but the current hegemony regarding the maintaining of integrity is not working.

Sports involving horses are unique in that they involve teams of human and non-human athletes. This thesis considers equine-based sport globally, but concentrates on the Olympic equestrian sports and horse racing as examples to demonstrate the inequities and inadequacies in the governance and disciplinary *status quo*, with respect to those non-human athletes, which impacts on the associated human. This is not an animal rights treatise, although animal welfare considerations do play a part in the discourse. Rather, this research takes a Gramscian perspective to examine the problem and define whether the problem is systemic and, further, if it is, why it has remained without radical alteration.

Ultimately, a new hegemony is proposed in dealing with cases of cheating with much greater integration of, and reciprocity between, the various equine sports governance structures.

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# Chapter 1 – Introduction

*Horse sense is the thing a horse has which keeps it from betting on people* (W. C. Fields)

## 1.1 The genesis of the study and the uniqueness of the human–equine team

The principal investigator (PI) has owned and bred horses for a number of years and is a competing member of British Dressage. This is administered by the British Equestrian Federation (BEF) as a national federation. The international sporting federation (ISF) for this sport is the Fédération Equestre Internationale (FEI). As a competitor, *prima facie* it seemed that the structures in place to maintain integrity in equestrian sport, especially anti-doping measures, were no different from those applied to sports only involving human participants. Thoroughbred race horses can be successfully re-trained to compete in FEI sports such as dressage, and from information obtained through contacts in UK thoroughbred racing, and a preliminary study of the Orders and Rules of Racing, the position appeared similar in that industry. This is despite the fact that the sport's governing body (SGB) was quite different to that governing equestrian sport, the concern was much wider than anti-doping (i.e. to include betting malpractice), and also that, as such, there is no ISF. A further brief review found that, globally, there are around 80 sports<sup>1</sup> which involve equines, either with a rider or as a means of locomotion, only a fraction of which are governed by the FEI or the British Horse Racing Authority (BHA), the two largest organisations in the sector.

This all seemed at odds with the lived experience of being involved in horse sport, with its unique nature. The horse is not an extension of the human participant as is a javelin, a football boot, or a Formula One racing car. These things operate solely as enhancements of the natural attributes that a human has, the precise application of force, accurate maneuverability on foot, and propulsion to a greater speed than one's rivals. Thus, integrity rules must focus on human participants in these sports. To the uninitiated, horses may first appear to be a version of such an enhancement, to enable the human competitor to jump higher, run faster, and so on. However, to an equestrian competitor, this is not an adequate analysis. Anyone who rides horses at any level soon becomes aware that the mount has its own agenda, and successful riding is as much about

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<sup>1</sup> See William Steinkraus et al. , (1987) *The Horse in Sport*, (London: Macdonald Orbis Ltd. 1987)

making the wants and needs of the horse coincide with those of the rider as it is anything else. Horses weigh many times the weight of a rider and are quite capable of killing or seriously injuring their human counterparts<sup>2</sup>, thus intense, often rapid, negotiation is required. In this analysis, the rider is no pilot any more than the first runner in a relay race is the pilot of the next. The language of this negotiation is complex, and involves the cross-modal use senses<sup>3</sup>. Equine research is only just beginning to empirically measure aspects of horse intelligence relevant to this discussion<sup>4</sup>. Further, considering the prominence given to top level horses in various media, it was considered that the elite competition horse has acquired real ‘athlete’ status. This may be as a direct consequence of the intelligence just mentioned, or as a related, but separate, development of social construction. A ‘rags to riches’ story involving a racehorse<sup>5</sup> makes a good film, just as it might with a human sports personality born into inauspicious beginnings. Also, an Australian equine superstar has made it on to the front cover of Vogue magazine<sup>6</sup> (see Fig. 1), and taking into account other points of intersection between sport, popular culture, art, entertainment, and commerce, it seemed that, through some sort of anthropomorphosis, the elite sport horse had achieved the status of non-human athlete. Therefore, the use of anti-doping regulations developed for human athletes, such as a minimally adjusted World Anti-Doping Agency (WADA) Code, seemed questionable, because elite competition horses are the ‘non-human athlete’ component of an inter-species team, not equipment. That contention is supported by language used in FEI regulations and Court of Arbitration for Sport (CAS) awards<sup>7</sup>.

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<sup>2</sup> Raymond Cripps and Denzil O’Brien, ‘Monitoring Falls During Eventing: Establishment of a National Surveillance System to Monitor Injury to Riders and Horses from Falls During the Cross-country Phase of Eventing in Australia: a Report for the Rural Industries Research and Development Corporation’. RIRDC (2004). This study identified almost 60 rider deaths in this Olympic sport 1993-2000.

<sup>3</sup> See Leanne Proops and Karen McComb, K. ‘Cross-modal individual recognition in domestic horses (*Equus caballus*) extends to familiar humans’, (2012) Proceedings of the Royal Society B, vol. 279(1741), 3131

<sup>4</sup> See for instance, Katalin Maros et al. ‘Comprehension of human pointing gestures in horses (*Equus caballus*)’ (2008), Anim Cogn. Volume 11, Issue 3, Netherlands: Springer, 457–466 and Rachele Malavasi, et al. ‘Evidence of heterospecific referential communication from domestic horses (*Equus caballus*) to humans’, (2016) Anim Cogn. Volume 19, Issue 5, Netherlands: Springer, 899–909.

<sup>5</sup> Secretariat (2010) Directed by Randal Wallace [Film]. USA: Disney Pictures Corporation.

<sup>6</sup> *Vogue Australia*, December 2012 Issue.

<sup>7</sup> For instance, in CAS 2012/A/2807 *Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS* 2012/A/2808 *Abdullah Waleed Sharbatly v. Fédération Equestre Internationale* (See also Appendix 1) which will be discussed in full, it was stated by the arbitrator that ‘A central and distinctive feature of equestrian sport is that it involves a partnership between two types of athlete, one human and one equine.’



It was determined to establish whether the transplanting of the human anti-doping framework to equine sports was a positive step, or whether horse sport ought to reject it as inappropriate and likely to lead to injustice. However, anti-doping and anti-corruption sporting rules do not exist in a vacuum. They are the product of the hegemony of governance of sport as a whole. The narrow field of enquiry around integrity rules was not likely to be possible without a thorough examination of the context within which integrity rules sit. The overall governance of equine sport would also have to be examined.

**Figure 1 – Black Caviar on the cover of the Australian Vogue.**



The study would not be an animal welfare-centred piece of work *per se*, although these considerations were bound to be a part of research into the controlled medications aspect of doping. The focus from the beginning was to examine

the impact of current governance and disciplinary frameworks on justice afforded to *human* athletes because of the suitability or otherwise of rules applying to *non-human* athletes.

If equine sports governance and disciplinary mechanisms are failing, the discourse must turn to what recourse athletes and other stakeholders have available to them. Human rights law may be influential, but how it might impact in this particular arena was indistinct. An initial literature search revealed much literature on human rights law after the coming into force of the Human Rights Act 1998<sup>8</sup> and a smaller, but growing, body of work on the effect human rights law may have on sport<sup>9</sup>. No work of any significance was found as to how human rights law and concepts

<sup>8</sup> See for example Nicholas Bamforth, 'The true 'Horizontal Effect' of the Human Rights Act 1998' (2001) 117 LQR 34, David Pannick, *Human Rights Law and Practice* (London: Butterworths 2004) and Dawn Oliver *Common Values and the Public-Private Divide*, (London: Butterworths 1999)

<sup>9</sup> See Robert Anderson, Jane Mulcahy and Akua Reindorf, 'independent and impartial? The potential impact of the Human Rights Act 1998 on Sports Tribunals' (2000) 4 ISLR 65, Rupert Beloff, 'Blood Sports – Blood Testing, the

of natural justice might apply in sports where one of the team is not a human athlete. There are two main areas where central tenets of the integrity management of human-only sports, if applied unthinkingly to non-human athletes, might be vulnerable to attack on human rights grounds. These are the concepts of strict liability and, through its modified form, certain rules of evidence such as burdens and standards of proof. Firstly, although it is common to find that human anti-doping rules contain an element of strict liability, this is often justified at least partly on the basis that an athlete or player has sole guardianship of his body and what is put into it<sup>10</sup>. Nevertheless, some commentators criticise the imposition of strict liability in enforcing sporting rules where it may cause injustice<sup>11</sup>. Many of the arguments for strict liability in sport regulation are closely aligned with those used to justify the same concept in Anglo-American criminal legal systems. Often pragmatic, these arguments are based around the premise that imposition of some parts of the social order would be impractical without it. A thorough examination of these matters would be necessary in this research.

Equine sports governance exists within the contested terms ‘sports law’ and *lex sportiva*, thus this is where any remedy for injustice might lie. There are commentators who suggest the difference between the concepts of ‘sport and the law’ and ‘sports law’ is of academic interest only<sup>12</sup>. There was therefore a need to completely re-examine this debate through the lens of equine sports to determine what the term *lex sportiva* can realistically mean in this context. This was necessary to determine whether the fact that the enormous number of different equine sports governance mechanisms had any practical effect on whether discipline and other related regulations had a just and equitable effect. The law pertaining to sport is a particularly complex area. The traditional notion of law is of rules applied to members of a nation state, applied by agents of the state to maintain order; for Slapper and Kelly, ‘to permit the members to interact

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common law and the Human Rights Act 1998’ (2000) 2 ISLR 43 and Simon Boyes, ‘Regulating Sport after the Human Rights Act 1998’ (2001) 151 NLJ 444.

<sup>10</sup> See for instance Aaron Wise ‘Strict Liability’ drug rules of sports governing bodies’ (1996) NLJ 1161 and Mark Young ‘Problems with the definition of doping: Does lack of fault or the absence of performance-enhancing effect matter?’ Sports Marketing: Law, Tax and Finance [Conference Documentation], IOC Museum, Lausanne, (1998).

<sup>11</sup> See Anne Amos ‘Inadvertent Doping and the WADA Code’, (2007) 9 Bond L. Rev. 1, p18 and generally Young (n 10).

<sup>12</sup> Adam Lewis and Jonathan Taylor. (eds) *Sport: Law and Practice*, (London: Butterworths 2003), preface, cited in Gardiner, James, O’Leary, Welsh, Blackshaw, Boyes, & Caiger *Sports Law* 4<sup>th</sup> Edn (London: Cavendish 2011) p85.

over a sustained period of time'<sup>13</sup>. However, this is an over simplification; 'In our society law plays an important part in the creation and maintenance of social order...[but]...order is not solely dependent on law, but also involves questions of a more general moral and political character'<sup>14</sup>. A statute might outlaw blasphemy, for example, and the meaning of that prohibition might be very clear to its originators in the paradigm that prevails. However, as society becomes more multi-cultural, Dworkin argues that to impose one way of life on such a society is to infringe on fundamental freedoms such as freedom of association, conscience, and expression<sup>15</sup>. Consequently, that meaning is allowed to become much less clear because of changing moral, religious, and political boundaries. Thus, the prohibition is rendered unenforceable and largely redundant. The law has not changed, but the societal context has; this is the reason for the redundancy and is thus more important than the law itself. Taking a phenomenological approach, the reality is in how this object – this law – is perceived, and not in any existence independent of human consciousness.

There is an element of supra-national law to consider as well as that created by individual nation states. Some law is created by nations that have common interests, such that they develop treaties or conventions. For Walker, this has given birth to a somewhat chaotic web of international legal orders that is far from ideal<sup>16</sup>. Nonetheless, understanding this 'web' is crucial to analysing the interaction between sport and law. In any event, in the absence of any kind of global judicial system, any international provisions are still enforced by state actors within geographically-limited jurisdictions. That jurisdiction might in itself be across a number of nation states by their collective agreement<sup>17</sup>. This is a further example of the complexity of modern law that sport must negotiate.

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<sup>13</sup> Gary Slapper and David Kelly, *English Legal System*, 15<sup>th</sup> Edn., (Oxon: Routledge 2014) 2.

<sup>14</sup> *Ibid.*

<sup>15</sup> Dan Pfeffer 'Group Integration and Multiculturalism: Theory, Policy, and Practice', (Basingstoke: Palgrave Macmillan 2015) 12.

<sup>16</sup> See Neil Walker 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders', (2008) 6(3) & (4) *International Journal of Constitutional Law*, 373-396.

<sup>17</sup> See for instance Massimo Fichera 'The European Arrest Warrant and the sovereign state: A marriage of convenience?' (2009) 15 *ELJ* 70 and Mark Mackerel 'Surrendering the fugitive – the European Arrest Warrant and the UK' (2007), 71 *Journal of Criminal Law*, 362.

Sports governance exists within this diverse matrix, in that the regulation of sporting activities is dependent on a mix of national law, international treaty, and what are little more than rules of the game. These latter rules may not be law in the true sense, but are nonetheless a central pillar of the subjective reality of persons engaged in sporting endeavour. The precise nature of sports governance can be viewed as a microcosm of all human society, in that when stripped back to the bare minimum in any given sport, just like wider society<sup>18</sup>, there are the ‘rulers’ and the ‘ruled’. Athletes are subject to being governed by an elite group, often made up of persons who used to compete in that sport and who have been elected by some sort of democratic process to perform a governance function. However, whether this tends to result in a cabal or in progressive, open, and transparent sports development is a matter of debate. As Gramsci writes ‘...the supremacy of a social group manifests itself in two ways, as ‘domination’ and as ‘intellectual and moral leadership’<sup>19</sup>. Most sports governing bodies are monopolies, or duopolies<sup>20</sup>, and no questioning of fundamental norms and values such as strict liability is countenanced. This discourse falls mainly to academics. Gramsci’s formulations do not then apply solely to nation state governance; sports governance is mostly global in nature, and aspects of it are examples of the ‘normative co-ordinations’<sup>21</sup> in Walker’s typology of modern international legal orders. The old orders characterised by nation states and their jurisdictional borders are giving way to a wide range of international agreements, not always at nation state level, to which increasing numbers of persons are subject.

So, ascertaining the rights and duties inherent in playing sport relies not only on an analysis of domestic and international law, but also on a consideration of a number of received truths that warrant analysis. These entrenched norms and values include a heavy reliance on strict liability in the creation of regulations designed to protect integrity in sport. That is to say, designed to deter, expose, and punish cheating. In turn, there are a number of unquestioned, or under-questioned, assumptions regarding what is cheating and what is fair play which are supremely

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<sup>18</sup> Antonio Gramsci *Selections from the Prison Notebooks*. Translated and edited by Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers 1971) 44.

<sup>19</sup> *Ibid.*, 57.

<sup>20</sup> For instance, the near monopolistic position of the Jockey Club was mentioned in *R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy* [1993] 2 All ER 207. Even where there are more than one ISF, such as in golf, boxing, and darts, obedience to one or another’s rules is necessary for elite competition.

<sup>21</sup> Walker (n 16) 377.

moral or ethical questions. This tendency for the ‘ruled’ to fail to question received truths is a recurring theme in Gramsci’s work. Referring to social structures and processes, Gramsci wrote that ‘one of the commonest totems is the belief about everything that exists, that it is ‘natural’ ...that it could do no other than exist’<sup>22</sup>. Regulation of sporting activity has developed against this background, and it is therefore a worthwhile field of enquiry to determine whether the regulations have developed to suit the needs of the regulated or the regulators, which is supremely a political question. It is particularly useful to examine sports governance through a Marxist lens, given the relative power of the athlete compared to their ‘ruling class’. For Karen and Washington, a Gramscian analysis of sports governance hegemony particularly suits the task:

‘Through what ...Gramsci called *ideological hegemony*, the major belief systems of the society are sufficiently accepted by the populace that the ruling class can be said to have the “consent of the governed”. [For example] ...the power that corporations and owners of sports teams exercise with respect to tax breaks, special anti-trust deals, stadium projects and favourable infrastructure arrangements...’<sup>23</sup>

This research examines the balance of power between those who govern sport, and those who participate in it from a Gramscian perspective<sup>24</sup>. It will deconstruct equine sports governance before re-imagining it to address the research question. It is very difficult to be an activist athlete given that every calorie of energy must be devoted to winning to reach the highest competitions. This leaves little inclination to take on the sporting ruling class and the structures as they stand, except when forced to fight back, i.e. when defending a disciplinary ‘charge’. Even then, the approach appears to mainly be contrition in the hope of a lesser sanction, rather than an outright challenge to the inequities of the system.

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<sup>22</sup> Gramsci (n 18) 157.

<sup>23</sup> David Karen and Richard Washington, (Eds) *Sociological Perspectives on Sport – The Games Outside the Games*, (London: Routledge 2015) 21.

<sup>24</sup> Thanks are due to John O’Leary for his work on sports law from a Gramscian perspective presented as a seminar at the Socio-Legal Studies Association Annual Conference, University of Warwick, 31<sup>st</sup> March to 2<sup>nd</sup> April 2015 which stimulated research in this thread.

## 1.2 Watershed

The events of 2013 and 2014 should be viewed as defining moments for equine sports. There is more detail in Chapter 5, but we should consider a summary here to explain why this is the time to research, and rethink, the regulation of horse sport.

In terms of UK horse racing, there had been significant integrity reviews in 2003 and 2008. Despite this, there were a series of doping allegations regarding Godolphin, and Lord Stevens' Quest organisation carried out a review in 2014<sup>25</sup> at the behest of Princess Haya, previous president of the FEI. The FEI had already turned over a 'new leaf' in relation to integrity and equestrianism<sup>26</sup> because of the scandals at the Athens and Beijing Games<sup>27</sup>. Princess Haya is married to Sheikh Mohammed of Dubai, owner of the Godolphin thoroughbred flat racing stables<sup>28</sup>, and a rider under FEI rules. In April 2013, news came that positive analytical findings had emerged from Sheikh Mohammed's Moulton Paddocks racing yard in Newmarket, and ultimately trainer Mahmood Al Zarooni was charged by the BHA in connection with these matters<sup>29</sup>. No blame was attached to Sheikh Mohammed himself.

Scandals associated with the Sheikh continued however, and there were problems at the endurance racing (FEI) yard at Morley Farm East, UK, in 2013<sup>30</sup>. There was also a seizure by the Border Agency of equine drugs on a Dubai Royal Air Wing flight<sup>31</sup>. It also later emerged that Mubarak bin Shafya, banned from training FEI-regulated endurance horses, was still training

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<sup>25</sup> Ben Rumsby, Pippa Cuckson and Marcus Armytage, 'Sheikh Mohammed Exonerated in Lord Stevens' Investigation into drug scandals in horse racing' (London, 19 April 2014) available at: <http://www.telegraph.co.uk/sport/horseracing/10633445/Sheikh-Mohammed-exonerated-in-Lord-Stevens-investigation-into-drug-scandals-in-horse-racing.html> (accessed on 19/04/17)

<sup>26</sup> FEI Press Releases available at: [http://www.prweb.com/releases/FEI\\_Equestrian/Lord\\_Stevens/prweb2824784.htm](http://www.prweb.com/releases/FEI_Equestrian/Lord_Stevens/prweb2824784.htm) (Accessed on 28/10/2013)

<sup>27</sup> Peter Charlish, *Drugs in Sport, Legal Information Management*, (Cambridge: CUP 2012) 1.

<sup>28</sup> James Riach 'Sheikh Mohammed launches inquiry after police seize drugs from Dubai jet'. *The Guardian* (London: 29 September 2013) (<http://www.theguardian.com/sport/2013/sep/29/sheikh-mohammed-inquiry-drugs-dubai> (accessed on 05/02/15)).

<sup>29</sup> Roger Blitz, 'Godolphin stable locked down after doping', *Financial Times Online*, [www.ft.com](http://www.ft.com) (London: 24 April 2013) (accessed on 25/04/13).

<sup>30</sup> Flora Watkins, 'Leading endurance trainer has illegal drugs seized,' *Horse and Hound*, (19 September 2013), Time Inc. (UK) Ltd., p6.

<sup>31</sup> Riach (n 28).

thoroughbreds in Dubai at a stable owned by Sheikh Mohammed<sup>32</sup>. In late 2014, there was so much pressure on Princess Haya as a result of her connections to the ruler of Dubai<sup>33</sup> that she did not seek a further term of office as president of the FEI.

This is a summary of some of the equine sporting integrity problems from that 24-month period. These and other integrity matters will be examined more closely to see if the epithet ‘crisis’ is appropriate. The purpose of this research is not to place blame on individuals; despite the ongoing mention of scandals connected in some way to Sheikh Mohammed’s equine holdings, these are presented only as evidence of systemic problems. The next task is to establish the nature, extent, and quality of the academic commentary that exists on horses and sport before fully formulating the research question and selecting appropriate methodology.

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<sup>32</sup> Greg Wood, ‘Dubai case raises new questions for Sheikh Mohammed’, *The Guardian Online*, (London: 30 September 2013) available at: <http://www.theguardian.com/sport/2013/sep/30/sheikh-mohammed-dubai> (accessed on 05/02/15)).

<sup>33</sup> Flora Watkins, ‘Crisis in British Endurance,’ *Horse and Hound*, London: (26 September 2013) Time Inc. (UK) Ltd., pp6-7.

## Chapter 2 – Methodology

*A jump jockey has to throw his heart over a fence – and then go over and catch it* (Dick Francis)

### 2.1 The importance of the right methodology

The selection of methodology for a PhD, or indeed any enterprise of worthwhile research, is of crucial importance. It provides both structure and underpinning to the research undertaken and arguments presented. It also makes it clear to the reader what the principal investigator's scholarly perspective is. How the research and arguments are analysed is, in part, determined by the researcher's life experience and position in society, or, put another way, their 'standpoint epistemology'<sup>34</sup>.

#### 2.1.1 Primary research in the field versus a doctrinal study

The 'expertise of the researcher is also a key consideration when weighing up the advantages and disadvantages of different [research] methods'<sup>35</sup>. For this study, practical experience with different research methods has been of considerable assistance in selecting the appropriate methodology. This was supported by the benefit of study of research methodology at Masters level. Early career research was entirely doctrinal, producing two books in the business and corporate law field<sup>36</sup> and one supporting the transfer of initial police training to higher education<sup>37</sup>.

There followed field research on what Crawford refers to 'police auxiliaries'<sup>38</sup>. The study used qualitative methods, was partly comparative and carried out in both the UK and Canada<sup>39</sup>. The

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<sup>34</sup> Caroline Morris and Cian Murphy, *Getting a PhD in Law*, (Oxford: Hart 2011) 28.

<sup>35</sup> Roy King and Emma Wincup, (Eds) *Doing Research in Crime and Justice* 2<sup>nd</sup> Edn., (Oxford: OUP 2008) 34.

<sup>36</sup> Jonathan Merritt (2002) *Modern Business Law Principles and Practice*, 3<sup>rd</sup> Edn., (Liverpool: Liverpool Academic Press 2002), Jonathan Merritt, *Introduction to Business Law*, 3<sup>rd</sup> Edn., (Liverpool: Liverpool Academic Press 2003)

<sup>37</sup> Jonathan Merritt, *Law for Student Police Officers*, 2<sup>nd</sup> Edn., (London: Sage 2009).

<sup>38</sup> See for instance Adam Crawford et al., *Plural policing: The mixed economy of visible patrols in England and Wales*, (Bristol: Policy Press 2005).

<sup>39</sup> Jonathan Merritt and Gavin Dingwall 'Does plural suit rural? Reflections on quasi-policing in the countryside', (2010) *International Journal of Police Science and Management*, Vol. 12 No. 3, 288-400, Jonathan Merritt, 'W[hither the PCSO? Police perceptions of the Police Community Support Officer's role, powers and future



research involved interviews and focus groups to develop a corpus of data which could be analysed with suitable computer software.

Based on the above experience, it was initially tempting to consider carrying out qualitative research, interviews, and focus groups. This would have included equestrian sports participants, racing jockeys, owners, trainers, and members of SGB or ISF hierarchies. The evidence gained in the police research was compelling, because this kind of social anthropology comes from the ‘coal face’ and represents the lived experiences of the key stakeholders<sup>40</sup>. That being said, primary research of this nature can be costly, both in terms of time and money, and only yields data from a relatively small number of people, nuanced and rich though that data often is. There are a great many different equine-based sports across the globe, and gathering primary data from even a select number of these was judged to be outside the scope of this project. Furthermore, the earlier police research had established that where research is being carried out with persons subject to a hierarchy, particularly if the focus includes an enforcement setting, it is necessary to be aware of the effect of the ‘gate keepers’<sup>41</sup>. These are persons who control access to the subjects, and who may have a vested interest in what is revealed. In the earlier research for example, supervisory police officers selected those to be interviewed. If the same methods were used for research into the effect of equine sports governance on individual stakeholders, the data might be skewed by the personnel who were selected, or self-selected, for interview. Put another way, only certain trainers with unimpeachable reputations might be suggested by the ‘gatekeepers’, or perhaps only riders who are likely to be ‘on message’.

An early stage meeting with Dr Georgina Crossman<sup>42</sup> and Ms Janice Shardlow, general counsel for the BEF, was held and their views were very helpful in feeding in to the decision on

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directions’, (2010) *Policing: An International Journal of Police Strategies and Management*, Vol. 33 No. 4, 731-749, Jonathan Merritt, ‘Pluralist models of policing: Legislating for police powers, a cautionary note from England and Wales’, (2009) *Policing: An International Journal of Police Strategies and Management*, Vol. 32 No. 2, 377-394.

<sup>40</sup> See for instance Malcolm Young (1991) *An Inside Job*, (Oxford: OUP 1991) and Judith Okely, *The Traveller-Gypsies*, (Cambridge: CUP 1983).

<sup>41</sup> Mark Israel and Iain Hay, *Research ethics for social scientists*, (London: Sage 2006), 70-73 and Lesley Noakes and Emma Wincup, *Criminological research: Understanding qualitative methods*, (London: Sage 2004).

<sup>42</sup> The author of Georgina Crossman, *The organisational landscape of the English horse industry: A contrast with Sweden and the Netherlands* (2010) PhD thesis Exeter University, available at:

methodology. In particular, it was pointed out that integrity was a controversial subject in equine-based sports, and potential subjects for qualitative research purposes might be difficult to obtain, or at best might be very guarded in what they said on record<sup>43</sup>. This supported the ‘gatekeepers’ point above.

Pooling all the above information, the decision was made that primary research on equine sports governance would not be suitably productive. It was considered too difficult to approach sufficient numbers of sector insiders who would be free of the influence of ‘gate keepers’, and this would be too significant an obstacle to produce meaningful data, whether using a qualitative or quantitative approach.

Doctrinal or ‘black letter’ legal research is concerned with the internal consistency of law and focuses ‘almost entirely on law’s own language of statutes and case law to make sense of the legal world’<sup>44</sup>. SGBs and ISFs are micro legal worlds, and thus some of the research in this thesis requires a careful analysis of the consistency or otherwise of sporting rules and regulations as they currently are. There are sections of the analysis in this thesis which are doctrinal in nature and draw on the experience of writing on business law and police powers mentioned above. In particular, the analysis of the FEI and BHA rules takes a doctrinal approach, as does the suggestion of a ‘due diligence’ defence. The advantages are as follows: There is a corpus of knowledge about key elements of the research in terms of sport as a whole, but virtually none of it has been viewed through the lens of equine-based sport; there would also be opportunities to work through the sources to distil answers to the research question while detached from the hegemony of the sporting world and thus be more likely to be thinking independently; finally, the practical difficulties of a primary research-based study with potentially a global reach were eliminated.

This would be too limited a categorisation of the entire research effort, however. The remainder of the investigation is socio-legal in nature, and that is explored in the next section.

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<https://ore.exeter.ac.uk/repository/bitstream/handle/10036/111475/CrossmanG.pdf?sequence=2> (Accessed on 12/03/15).

<sup>43</sup> Meeting notes, British Equestrian Federation HQ, Stoneleigh, Warwickshire, 20<sup>th</sup> June 2011.

<sup>44</sup> Morris and Murphy (n 34) 31.

### 2.1.2 Socio-legal research

For Cryer et al., law and sociology and law and political science are an ‘accepted canon’ of international law theories, methodologies, or approaches<sup>45</sup>. Socio-legal research is interested in discovering ‘law in action’, as opposed to simply ‘law in the books’ and is therefore in the best position to ‘analyse the social network of ‘power relations’, and the ways that law and legal institutions/networks contribute to those relations’<sup>46</sup>. Just as it is for the law of the land, it is difficult to understand the laws (regulations) of an SGB without understanding the society (social order *within* the sport/s) in which they operate. A major benefit is that ‘[s]ocio-legal research can uncover and expose the (previously unquestioned) political nature of laws...’<sup>47</sup>

It is important to justify the use of a subjective or objective paradigm to consider the research question. A great deal of the research effort in this thesis is devoted to analysing sports governance and equine sports. This is in order to consider the effectiveness and the true motivations behind the current disciplinary regimes, their compatibility with each other, and finally as a framework for any recommended solutions. The way that organisations govern themselves is an area of academic enquiry in itself, and there are considerable crossovers between the study of corporate governance and that of sports governance. For instance, for Downie, ‘traditional ideas of corporate governance are embodied in the definitions of sports governance’<sup>48</sup> so drawing analogies between the two fields of study is useful for this thesis. Burrell and Morgan consider that in studying corporate life ‘all theories of organisation are based upon a philosophy of science and a theory of society’<sup>49</sup>. They base their study on four sets of explicit or implicit assumptions about the nature of the social world. These are; *ontology*, whether the phenomena under examination is ‘real’ – as an external entity imposing itself on the consciousness of the individual – or a product of that consciousness only, and thus an internal reality; *epistemology*, i.e. whether knowledge itself is a hard reality capable of being transmitted

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<sup>45</sup> Robert Cryer et al. *Research Methodologies in EU and International Law*, (Oxford: Hart 2011) 10-11.

<sup>46</sup> *Ibid.*, 86.

<sup>47</sup> Morris and Murphy (n 34) 35.

<sup>48</sup> Rachelle Downie, ‘Improving the Performance of Sport’s Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport’ (2011), *Melbourne Journal of International Law*, Vol 12, Issue 2, 5.

<sup>49</sup> Gibson Burrell and Gareth Morgan, *Sociological Paradigms and Organisational Analysis*, (Burlington: Ashgate 2005) 1-3.

to another individual or a softer almost transcendental concept; *human nature* or whether human life has ‘free will’ at centre stage or whether we are conditioned by our external circumstances and the impact of these three on *methodology*<sup>50</sup>.

Further, Burrell and Morgan recast sociology’s ‘order-conflict’ debate as one of ‘regulation’ versus ‘radical change’ as differing frames of reference for the analysis of social processes. The former is categorised by such as *status quo*, social order, consensus, and cohesion, and the latter by structural conflict, modes of domination, and contradiction<sup>51</sup>. Ultimately, Burrell and Morgan’s work suggests four mutually exclusive paradigms for the study of human organisations which offer four alternative views. These paradigms are *functionalist*, *interpretive*, *radical humanist*, and *radical structuralist*. It is important to consider which of these might be most logical as a frame of reference to study equine sports governance.

The *functionalist paradigm* is dominant in sociology and the study of organisations. It is concerned with the study of order and status quo, and thus in Burrell and Morgan’s analysis would be categorised as taking a ‘regulation’ rather than ‘radical change’ approach.

Functionalism is positivist and builds on the work of Auguste Comte, Emile Durkheim, and others. These thinkers favoured a view of the social world as ‘composed of relatively concrete empirical artefacts and relationships which can be identified, studied, and measured through approaches derived from the social sciences’<sup>52</sup>. For such as Durkheim, ‘social facts’ are objective and exist outside human consciousness and restraining humans in their everyday activities.

The *interpretive paradigm* is concerned with understanding the nature of the social world at the level of individual subjective experience. It is within the sociology of regulation like functionalism. It sees the social world as an ‘emergent social process which is created by the individuals concerned’<sup>53</sup>. Social reality has little existence outside the consciousness of any single individual.

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* 18.

<sup>52</sup> *Ibid.* 26.

<sup>53</sup> *Ibid.* 28.

Next, the *radical structuralist paradigm* owes much to Karl Marx's later work. It shares some of the features of the *functionalist paradigm* in that it is positivist and objectivist, but is directed at fundamentally different ends. Radical structuralism is committed to such as radical change emphasising structural conflict and modes of domination and contradiction<sup>54</sup>.

The *radical humanist paradigm* is concerned with radical change and takes a subjective viewpoint, much like the *interpretive paradigm*, but emphasises the importance of overthrowing or transcending the limitations of existing social arrangements<sup>55</sup>. A key feature of this paradigm is the 'cognitive wedge' driven between humans and their true consciousness by the ideological superstructures with which they interact. Critiquing the *status quo*, the paradigm seeks to find ways of release from the constraints this wedge produces. Marx forged the basis for radical humanism in his earlier work, and this was developed by Gramsci<sup>56</sup>. For Gramsci '[t]he public 'believes' that the external world is objectively real, but it is precisely here that the question arises: What is the origin of this 'belief', and what critical value does it 'objectively' have?'<sup>57</sup>. For the participant in sport, the governance *status quo* – from overall structure to rules of the game to doping control – is accepted by many as an unchallengeable knowable reality exemplified by attitudes such as this; 'we cannot, without blinding reason and cause, move one millimetre from strict liability – if we do, the battle to save sport is lost'<sup>58</sup>. This is an approach critiqued at length later in this thesis. This includes, but is not limited to, a discourse on whether or not this is an approach that is ultimately for the convenience of the enforcers, not those subject to enforcement, and is the result of only one, hegemonic, world-view.

In considering the way that sports governance operates, it is tempting to prefer the *functionalist paradigm* as a frame of reference. The imposition of rules and structures by a governing body could be said to be external realities that restrain sports participants in their day-to-day sporting activities. Firstly though, and that said, much of the 'law' regulating sports participants and those

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<sup>54</sup> *Ibid.* 33-35.

<sup>55</sup> *Ibid.* 32.

<sup>56</sup> *Ibid.* 33.

<sup>57</sup> Gramsci (n 18) 441.

<sup>58</sup> Sebastien Coe, 'We cannot move from strict liability rule', *Daily Telegraph Online* (25 February 2004) available from: <http://www.telegraph.co.uk/sport/othersports/drugsinsport/2373729/We-cannot-move-from-strict-liability-rule.html> (accessed on 4th October 2017). See also Jannica Houben, 'Proportionality in the WADC: Is there Enough Room for Flexibility?' (2007) *International Sports Law Journal*, 1-2, 10.

associated with their activities is not law at all in the legislative sense. With the notable exceptions of Belgium and Greece, who criminalise cheating athletes<sup>59</sup>, the law regulating sports people are sporting rules without any state applied sanction. Of course, state *sponsored* outcomes can come into play, such as national courts enforcing an arbitral award, and this is all underpinned by the law of contract, but this is not punishment by the state. Adherence and compliance with these sporting rules is nevertheless required to compete under the auspices of the organisation. Consequently, the sanctions applied to a transgressing sportsperson, say on a doping violation, are only ‘real’ to them because of an internal desire to remain in the sport at an elite competitive level; damages are not routinely awarded in addition to a ban or disqualification. Thus, this can be viewed as a subjective reality, a sportsperson who had already decided to retire from the sport would construct a doping ban as of little consequence. Contrast this with the situation of a currently competing gymnast, whose careers are typically short at the elite level, who would construct the same sanction as catastrophic and potentially career ending. This lived experience is quite different to nation state governance which, even if subverted completely by a despotic ruling class, is nevertheless an external reality with which all citizens must comply without any element of choice.

This subjectivity is not limited to sport and it is important to differentiate which strand of sports law is being referred to. In wider society, the relative importance of layers of social control and their agents are a social construction<sup>60</sup>. National law is real and objective, but the rules governing human behaviour will be placed in a hierarchy depending on how the actor perceives their importance. For Zee, it may well be more important to a devout Jewish woman that a divorce is granted by a Beth Din or religious court than by the family courts<sup>61</sup>. Without the approval of the Beth Din, any further children will be ‘mamzerim’ and restricted in their marriage options. Zee makes analogies with the Islamic tradition as well. Further, in the United States particularly there is a live debate as to which document has precedence, the Christian Bible or the Constitution<sup>62</sup> in

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<sup>59</sup> John O’Leary, *Drugs & Doping in Sports: Socio-legal Perspectives*, (London: Cavendish 2001) 259.

<sup>60</sup> Tim Newburn *Criminology*, 2<sup>nd</sup> Edn., (London: Routledge 2007) 8.

<sup>61</sup> See Machteld Zee, *Choosing Sharia? Multiculturalism, Islamic Fundamentalism and Sharia Councils*, (The Hague: Eleven International Publishing 2016).

<sup>62</sup> For an interesting critique of this debate, see Peter Smith and Robert Tuttle, ‘Biblical Literalism and Constitutional Originalism’ (2011), 86 *Notre Dame L. Rev.* 693.

such matters as abortion or same-sex marriage. Christian fundamentalist politicians and Christian academics prefer the former interpretation. Accordingly, in analysing the true status of the regulations of SGBs and rulings on them, it is necessary to consider whether to view these as absolute ‘knowable truths’ or as having an importance which is subjective and in the mind of the athlete. Aspects of sports law which are domestic law as applied to sport, such as a personal injury action arising from a dubious refereeing decision<sup>63</sup> or a breach of contract case heard in the civil courts as in *Modahl v British Athletic Federation Ltd (No 2)*<sup>64</sup> are objective truths. They are conducted under the law of the land, applicable to all, and whose consequences cannot be escaped<sup>65</sup>. The same is not true of actions taken over breaches of sports disciplinary relationships, their basis in contract law notwithstanding.

This thesis is concerned with examining the possibility of radical change in the way that equine sport is governed. Furthermore, it considers the inherent conflicts in sports governance frameworks applied to horse non-human athletes and the effect on justice afforded to the human stakeholder. To that extent then, there is a desire to consider the overthrow of the (sport) social order in a way that Marx or Gramsci might have espoused. Gramsci, for instance, wrote of the ‘coercive power of the [ruling class] state apparatus...’ and an ‘...acceptance by the ruled of a conception of the world which belongs to the rulers’. This is an appropriate starting point to analyse the possibility of radical new ways to write and interpret regulations for horse sport.

To conclude, the sports regulatory framework is thus not an external reality imposed upon the participants in horse sport, or indeed any sport, because the participants choose to adhere to it with the near certainty of not being eligible to participate at the elite level if they do not. The regulations are therefore as Burrell and Morgan’s *interpretive paradigm* (with which *radical humanism* has much in common<sup>66</sup>) suggests ‘an emergent social process which is created by the individuals concerned’<sup>67</sup> and thus a subjective reality. With all the foregoing in mind, the consideration of governance that follows is undertaken with the *radical humanist paradigm* as a frame of reference.

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<sup>63</sup> Vowles v Evans [2003] EWCA Civ 318.

<sup>64</sup> [2001] EWCA Civ 1447.

<sup>65</sup> In this case bankruptcy for both parties.

<sup>66</sup> Burrell and Morgan (n 48) 32.

<sup>67</sup> *Ibid.* 28.

### 2.1.3 Why Gramsci?

In the preceding section, it was mentioned that Gramsci developed Marx's earlier work on *radical humanism*. Although Marxism is not in the ascendancy as a political ideology in the wider world, there is currently strong evidence of a growing populist resurgence expressing dissatisfaction with the establishment or 'ruling elite'. This is not born out of a broad coalition of the left by any means, but there are leftist elements in this movement, such as the 'Five Star' protest body in Italy and leading elements of the British Labour Party. This can be evidenced by accusations of the latter's lacklustre campaigning for 'remain' in the 2016 referendum on EU membership. The irony is that in many instances the foot soldiers in this movement are members of the white working class, urged on by a nationalistic and xenophobic, if not overtly racist, narrative. The 'Brexit' vote, the election of Donald Trump and the 'No' Italian referendum result of 4<sup>th</sup> November 2016, (a *de facto* protest against the wealthy special interest groups at the top echelons of Italian society) are all indicative of a sea change in world politics against the established order<sup>68</sup>.

Furthermore, there is a strong argument that, as Wolcher has it, 'We are all Marxists now'<sup>69</sup>. The social reform that has been ushered in as a result of Marx's teachings, either acknowledges that they had some merit, or are a way of reducing the possibility of a socialist revolution in such as the UK. While we still live in a deeply capitalist society, there are many aspects of social life today which ultimately derive from the Marxist narrative. These include free education systems and, in many developed nations, medical treatment free at the point of use, not to mention the concept of the minimum wage, state benefits, and state pension arrangements. These are what Gramsci referred to as 'reformist corrosion'<sup>70</sup> of the capitalist regimes of the 19<sup>th</sup> century. Marx also made much of the tendency for a population to accept prevailing social conditions as inevitable<sup>71</sup>, a recurring theme in this thesis. These prevailing social conditions have an effect on

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<sup>68</sup> Julian Coman, 'First Brexit then Trump. Is Italy next for the west's populist wave?', *The Observer Online* (London: 27 November 2016) available at <https://www.theguardian.com/world/2016/nov/27/matteo-renzi-politics-italy-european-union-brexit-trump> (accessed on 20/04/2017).

<sup>69</sup> Louis Wolcher, *Law's Task: The Tragic Circle of Law, Justice and Human Suffering*, (Oxford: Routledge 2008), p xvi.

<sup>70</sup> Gramsci (n 18) 119.

<sup>71</sup> Wolcher (n 69) xvi.



the way sport is governed, and inequities found in wider society transferring into the sports ruling function. This is sometimes the subject of commentary, such as with regard to sexism in sport. In the case of horseracing, this was highlighted by Michelle Payne's comments on being the first female jockey to win the Melbourne Cup<sup>72</sup>. There has also been criticism of the parochial nature of English football governance decisions<sup>73</sup>, but real change appears slow and grudging. The example of the English FA is particularly illustrative in that, at the time of writing, the need for Parliamentary legislation to reform this SGB is under consideration<sup>74</sup>. Of particular concern is the inability of the sport to reform itself because of the 'vested interests' represented at the highest level of the game and also a lack of diversity. Of the 123 members of the FA Council, a kind of 'parliament', only six are women and four from BME communities<sup>75</sup>. In point of fact, similar concerns are raised about the UK Parliament, leading to women-only MP candidate shortlists being mooted from time to time<sup>76</sup>.

The foregoing makes a robust case for a Marxist critique of sport governance and disciplinary arrangements based on Gramsci's development of Marx's earlier works. The particular suitability of equine sport for a Gramscian analysis however is apparent from its pronounced replication of the capitalist 'old order' within the sports. This 'old order' is Durkheim's social structure of 'mechanical solidarity'<sup>77</sup> which might alternatively be considered feudal and ultimately gave way to 'organic solidarity' a better way to analyse the new social order of the late 20<sup>th</sup>/early 21<sup>st</sup> centuries. A society characterised by mechanical solidarity is one where relative wealth and position are inextricably linked with a fixed hierarchy with levels ranging from the peasantry, through the merchant and middle classes, to the aristocracy and the

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<sup>72</sup> See Angela Pippas, *Breaking the Mould: Taking a Hammer to Sexism in Sport*, (New York: Simon and Schuster 2017).

<sup>73</sup> Dan Roan, 'FA reform: Former chiefs say, 'elderly white men' block change', *BBC Sport Online* (12 December 2016) available at <http://www.bbc.co.uk/sport/football/38274152> (accessed on 20/04/17).

<sup>74</sup> Richard Coway, 'FA reform: As MPs debate the issue, is real change a stretch too far?', *BBC Sport Online* (8 February 2017) available at: <http://www.bbc.co.uk/sport/football/38907978> (accessed on 20/04/17).

<sup>75</sup> Owen Gibson, 'Will the FA's turkeys vote for Christmas? Don't hold your breath', *The Guardian Online*, (London: 16 February 2016) available at: <https://www.theguardian.com/football/blog/2016/feb/16/fa-meeting-council-wembley-greg-dyke-reforms-chairman> (accessed on 20/04/17).

<sup>76</sup> See for instance, Aisha Gani, 'Should there be all-women shortlists?', *Guardian Online*, (London: 22 August 2014) available at <https://www.theguardian.com/politics/2014/aug/22/-sp-should-there-be-all-women-shortlists> (accessed on 20/04/17).

<sup>77</sup> Newburn (n 60) 171-172.

monarchy. In such a pre-industrial society, as was the case for centuries in the UK, largely hereditary social position and wealth were indicated by the possession of assets including land and property, and the premier mode of transport prior to the invention of the steam train, the horse. This important chattel features in the language of early commercial cases, a horse was considered in one famous contract law case as enhanced consideration<sup>78</sup>. Swain considers the horse as important in the early development of commercial law because it generated so many ‘faulty goods cases’<sup>79</sup>.

In addition, the concept of chivalry is embedded in western culture and has its roots in relative societal position and horses. The word is derived from the French *cheval* (horse) as only knights of the realm, bound by the notion of chivalry, would have the means to afford such an expensive animal. Horse racing is known as ‘The Sport of Kings’ and this is because on the inception of racing in the sixteenth century<sup>80</sup> when to own and train race horses would have been out of the reach of the vast majority of the population. This trend continued in the US, where at the birth of that republic George Washington was a racehorse owner and many of the patrons of the oldest racecourses there, such as Auguste Belmont, benefactor of Belmont Park<sup>81</sup>, were members of families who made vast wealth from the industrial revolution. This was, for Marxists, at the expense of the working classes.

Returning to UK history, the word ‘cavalier’ as an adjective is pejorative, attached with a sense of ‘haughtiness and domination’<sup>82</sup>. The Parliamentary side during the English Civil War used the term to draw attention to the aristocracy’s fascination with, and time wasted on, classical horsemanship as opposed to the pressing social issues of the time. Given all of this, equestrianism and horse racing are currently, and not entirely unfairly, socially constructed as being elitist. This is not helped by the notable number of members of various royal dynasties that are associated with the higher echelons of horse sports, and are members of their ‘ruling class’.

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<sup>78</sup> *Pinnel’s Case* [1602] 5 Co. Rep. 117a

<sup>79</sup> Warren Swain, ‘Horse sales: the problem of consumer contracts from a historical perspective’ in James Devenney and Mel Kenny (eds.) *European Consumer Protection Cambridge*, (Cambridge: CUP 2012) 282.

<sup>80</sup> Simon Gardiner et al. *Sports Law* 4th Edn (London: Cavendish 2011)13.

<sup>81</sup> See Micheal Klepper and Robert Gunther, *The Wealthy 100: From Benjamin Franklin to Bill Gates-A Ranking of the Richest Americans, Past and Present*, (New York: Citadel 1996).

<sup>82</sup> *Goldsmith’s History of England with Numerous Original Notes*, Volume 2, (London: Alan Bell and Co. 1836) 125.

For instance, HRH Queen Elizabeth II is a noted lifelong horse owner, breeder, and rider, still riding occasionally at 90 years of age. She is currently patron of the British Horse Society, the Fell Pony Society, the Highland Pony Society, the Shire Horse Society, the Welsh Pony and Cob Society, and the Thoroughbred Breeders' Association<sup>83</sup>. In turn, HRH the Prince of Wales was for a considerable time a racing jockey and owned race horses. HRH Princess Anne is a former event rider, her ex-husband Captain Mark Philips is a noted course designer, and their daughter Princess Zara currently competes at Olympic level. Princess Anne is a former FEI president and now member of the IOC. Other ex-equestrians on the IOC include HSH Princess Nora of Lichtenstein and Sheikh Ahmad Al-Fahad Al-Sabah of Kuwait. Princess Haya of Jordan is a former president of the FEI and her husband Sheikh Mohammed of Dubai is a racing yard owner and major figure in international endurance racing. The predominance of aristocrats in polo is further evidence of the 'received truth' of the attachment of horse sport to the upper levels of the traditional class system. HRH the Prince of Wales was a regular polo competitor from the age of 15 until his decision to retire from the sport in 2000. He continues to be involved in the sport through the participation of Princes William and Harry<sup>84</sup>. Like most sports, polo is attempting to tackle the elitist public perception and increase participation from all levels of society<sup>85</sup>.

Finally, from a Marxist perspective, sport is an effective way to distract the population from the inequities of capitalism, and especially from doing anything about it. There is, however, another way that a Marxist analysis can assist; specifically, it is an effective way to examine the internal structures, rule creation, and enforcement by SGBs. This does not though establish the reasons for a Gramscian, and not for instance a Trotskyist discourse. For Jessop, 'Gramsci shares with Lenin and Trotsky the distinction of being one of the three most significant and influential Marxist theorists of the imperialist epoch'<sup>86</sup>. However, he goes on to say that while Lenin and Trotsky were influenced by the revolutionary process in 'backward' Russia, Gramsci was

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<sup>83</sup> See 'The Queen' available at: <http://www.horseandhound.co.uk/tag/the-queen#UQkUYarHsh9P08s0.99> (accessed on 01/12/16).

<sup>84</sup> See The Prince of Wales and Duchy of Cornwall website, available at: <http://www.princeofwales.gov.uk/the-prince-of-wales/interests/sports> (accessed on 01/12/16).

<sup>85</sup> Hannah Betts 'Polo: the sport of kings that anyone can play', *Telegraph Online* (London: 29 April 2010) available at <http://www.telegraph.co.uk/sport/othersports/polo/7646542/Polo-the-sport-of-kings-that-anyone-can-play.html> (accessed on 01/12/16).

<sup>86</sup> Bob Jessop *The Capitalist State*, (Oxford: Martin Robertson and Co. 1983) 142.

concerned to overturn the social order in more advanced capitalist societies. It is these latter societies that modern sports structures, as mini societies within a capitalist hegemony, have most in common. An analogy with pre-First World War Russia, which had extreme social conditions peculiar to the time and to the region<sup>87</sup>, is not so useful. For Joll, quoting Althusser, the only Marxist who could really ‘follow up the explorations of Marx and Engels’ was Antonio Gramsci. He added cultural influences to economic ones in developing his theories, and considered the extent to which the ruled are persuaded to accept the power of the rulers, rather than just coerced<sup>88</sup>. Gramsci himself drew an analogy between Marx and Christ and Lenin with St. Paul. For Gramsci, Marx, like Christ, was responsible for an entirely new ‘world outlook’ or *weltanschauung*<sup>89</sup>. Gramsci phrases it like this, ‘Christ-*weltanschauung*, and St. Paul – organiser, action, expansion of the *weltanschauung*’<sup>90</sup>. Gramsci applied Lenin’s organisation and ideas for action regarding Marxism to the world outside Imperialist Russia.

The search for a new ‘world outlook’ in equine sport is a key element in this research. In addition, there are peculiar historical and social factors pertinent particularly to *equine* sports. Therefore, a socio-legal, Gramscian analysis of *equine* sport structures is the most effective way to compliment a doctrinal review of specific rules, statutes, and treaties related to these sports.

## 2.2 Research Question

As explained in the introduction, this is not intended to be an animal welfare piece, although such considerations are not entirely excluded. This thesis is centred on the potential injustice of disciplining the human athlete when it is the animal member of the team that is the subject of an *adverse analytical finding*, commonly referred to as ‘doping’. The term *non-human athlete* will be justified and used. With that in mind, the research question itself must allow for a full analysis of the field of enquiry and be capable of leading to a clear, concise conclusion, if one is possible. The research question ultimately selected is as follows therefore:

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<sup>87</sup> H. P. Willmott, *World War One*, (London: Dorling Kindersley 2015) 23.

<sup>88</sup> James Joll, *Gramsci*, (Glasgow: Fontana 1977) 7-8.

<sup>89</sup> Gramsci (n 18) 381.

<sup>90</sup> *Ibid.* 382.

***Can changes based on a Gramscian critique of the governance of equine sports substantially reduce the occurrence of crises in integrity for human participants?***

This formulation links an investigation into the way the sports are governed to a critique of the disciplinary structures as enforcement of the rules *and* as bolstering the established social order *within* the sports. The question further allows an analysis of whether injustices from such as strict liability are acceptable as ‘collateral damage’ and whether catching the unwary and negligent as well as the cheat produces enhanced compliance with the social order. Alternatively, this approach may have negative consequences which outweigh its benefits. If the latter is the case, then tinkering with the system, or ever stricter prohibition, may not be the answer. ‘Those who do not learn from history are doomed to repeat it’<sup>91</sup> so this research question allows for a ‘root and branch’ examination of potential change, rather than a superficial re-ordering of the *status quo*.

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<sup>91</sup> Ted Crawford, ‘Trostky and his Critics’, *Revolutionary History*, Volume I, (London: Merlin Press 2013) citing George Santayana, *Reason in Common Sense - Volume 1 of The Life of Reason*, (1905) 284.

## Chapter 3 – Literature Review

*Horse riding has a perfect comparison with singing – you must know where the double fences are* (Luciano Pavarotti)

### 3.1 Introduction

The foregoing outlines how the broad scope of the study was formed. Research for a thesis should form an original contribution to the existing body of knowledge<sup>92</sup>. In this work, the contextualisation of the prominent sports integrity discourses within the world of sport and the equine, together with some entirely novel suggestions, does just that. There follows a consideration of the relevant research position to establish the groundwork from which this thesis is built and the gaps this research addresses.

#### 3.1.1 The equine lacunae

Within the social sciences, there have been investigations into the governance of horse sport. Crossman, for instance, carried out a study of the UK horse industry as a whole using the Netherlands and Sweden as comparators<sup>93</sup>. This necessitated some consideration of the governance of horse sport in these countries, and the degree of government involvement in that sector<sup>94</sup>. Crossman's results were interesting, in that she discovered that government involvement differed quite markedly in different nation states. Government involvement was relatively low in the UK, US, and New Zealand, but was relatively high by comparison in Germany, France, and Sweden. Crossman also categorised the nature of the horse industry as 'fragmented', 'semi-structured', or 'organised'<sup>95</sup>. For Crossman, the Netherlands was at the intersection between 'organised' and low government involvement. When compared with the other countries ultimately studied by Crossman – the UK and Sweden – the Netherlands has the second greatest number of horses per capita at 26.4/1000 compared to 17 in the UK. The Dutch also have by far the greatest number of horses per square kilometre, at 13 compared to 4.3 in the

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<sup>92</sup> Morris and Murphy (n 34) and see generally Estelle Phillips and Derek Pugh *How to get a PhD: A Handbook for Students and Their Supervisors*, 5<sup>th</sup> Edn., (Oxford: OUP 2010).

<sup>93</sup> Crossman, (n 42).

<sup>94</sup> *Ibid.* 75-79.

<sup>95</sup> *Ibid.* 77.

UK, and a far higher number of regular rider members of its national equestrian federation at 43% compared to the UK's 11%<sup>96</sup>. This analysis is however limited to a study of the governance regimes as they are, rather than as they could be, and the aim of the following research is to consider the possibility of radical change.

The originality of this thesis is, in large part, demonstrated by the ongoing theme of re-examining long-held received truths and considering whether some basic tenets of sports governance and integrity management could be re-imagined to address current paradoxes and injustices. To start with, there is a need to re-imagine the social construct of the elite competition horse. Preliminary work on the construct of the horse as an athlete has been done by Gilbert and Gillett<sup>97</sup>, but their study was limited to one specific type of horse and this research applies that work with a much wider frame, to the major equine sports of horse racing and the Olympic equestrian sports.

The requirement to re-consider the modern construct of the horse is a foundation stone of a critique of strict liability, and an exposé of its particular shortcomings in the specific context of equine sports. Strict liability as a component of common law legal systems has a well-established discourse associated with it, for instance Simester offers some criticisms and some justifications in his research<sup>98</sup>. Husak even defends a version of strict liability homicide as good public policy<sup>99</sup> (albeit as the lesser of two or more evils), whereas Nagel is deeply critical of this type of liability<sup>100</sup>.

In terms of strict liability as applied to sports law, Anderson offers one of the more evenly balanced critiques, providing the traditional polemic as best enunciated in *USA Shooting & Quigley v UIT*<sup>101</sup> which pits 'the promotion of the collective interest of athletes above the 'just' treatment of the individual'<sup>102</sup> against the draconian nature of such an absolutist approach which

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<sup>96</sup> *Ibid.* 82.

<sup>97</sup> Michelle Gilbert and James Gillett, 'Equine athletes and interspecies sport' (2011), *International Review for the Sociology of Sport*, vol. 47, 5 632-633.

<sup>98</sup> Andrew Simester, 'Is strict liability always wrong?' in Andrew Simester (Ed), *Appraising Strict Liability*, (Oxford: OUP 2005) 28.

<sup>99</sup> Douglas Husak, 'Strict Liability, Justice, and Proportionality' in Simester (n 98) 81-104.

<sup>100</sup> 'Moral Luck', in *Mortal Questions* (Cambridge 1979), p31 cited in Simester (n 98) 49.

<sup>101</sup> CAS 94/129 *USA Shooting & Quigley v UIT* [15].

<sup>102</sup> Jack Anderson, *Modern Sports Law*, (Oxford: Hart 2010) 124.

lacks a ‘principled and proportionate basis of liability’<sup>103</sup>. For Anderson, the legacy of *Quigley* was a ‘modified’ approach to strict liability which allowed for lack of moral fault in the application of sanction. This seems an unhappy compromise where equine-based sports are concerned. It is notable that the thorny question of the application of strict liability to non-human participants is not tackled by Anderson. It might just be arguable that the ‘collective interest of athletes’ outweighs the need for justice in the individual case where autonomous humans are concerned, although that is for another research project to investigate. Given the added layer of complexity of a non-human participant – the responsibility of the human member of the team – there is a need to consider whether the scales have been tipped too far towards those collective interests to remain conscionable.

Soek comments further on *Quigley* thus, quoting the CAS Award, ‘... it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating intentional unfairness to the whole body of other competitors’<sup>104</sup> but wonders if it is laudable for the panel to justify that simply on the basis that life is not fair. Further, Scott, in commenting on doping bans based on strict liability said, ‘the morally innocent may have to suffer in order to ensure the guilty do not escape’<sup>105</sup> which seems rather at odds with the maxim ‘...better that ten guilty persons escape than that one innocent person suffer...’<sup>106</sup> which is a cornerstone of criminal law. This paradox warrants further enquiry in the context of the unique context of equine sports. Amos is perhaps one of the fiercest critics of strict liability in sport<sup>107</sup>, but her research does not consider strict liability when applied to human-equine partnerships.

It is not true to say that none of the literature refers to horses, for instance Soek refers to the chain of custody of samples in the context of an equestrian case – CAS 91/56, 25-6-92, *S v FEI*<sup>108</sup> – but this is not in an attempt to look at the unique nature of equine sport versus human only sport in the context of integrity regulation. The discussion is, however, limited to a

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<sup>103</sup> *Ibid.*

<sup>104</sup> Jan Soek *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, (The Hague: Asser Press 2006) 149.

<sup>105</sup> *Gasser v. Stinson*, QBD, unreported, 15 June 1988.

<sup>106</sup> Attr. Sir William Blackstone and Benjamin Franklin.

<sup>107</sup> Amos (n 11) 1-25.

<sup>108</sup> Soek (n 104) 108.



consideration of technical differences between human and veterinary evidence harvesting procedures. Soek also points out that FEI regulations used to be even more draconian in that proof of an adverse analytical finding used to result in a reverse burden on the person responsible to show there was no intent to influence the performance of the horse<sup>109</sup>. Again, this goes no further than to say that the current status quo is at least an improvement on pre-Court of Arbitration for Sport (CAS) FEI regulations. Soek does not address the central problem this research is concerned with, that the body affected by the drug is that of a non-human athlete whereas the controlling mind is that of a different athlete of a different species.

This research, however, places equine sports squarely at the centre of a discussion of the merits of strict liability and its modified version replete with complex reverse burdens to demonstrate how their equitability compared to those applied to human athletes. There is commentary on the extent to which reverse burdens of proof and varying types of standards of proof have fared in domestic criminal law<sup>110</sup>. There is also some case law on the legality of standards of proof other than ‘beyond reasonable doubt’ and ‘on the balance of probabilities’<sup>111</sup> and at least one BHA appeal based on that ground<sup>112</sup>. This area has not been explored further, however, to bring together these threads and establish the consequences of differing standards of proof in different equine sports. This is also true of reverse burdens, in that their application to equestrian and horse racing regulations has not been ‘stress-tested’ to date.

This research also identifies the limits to how these inequities might be challengeable by such as a judicial review or human rights claim. Much has been written about the difficulty in bringing such an action against a SGB, as it does not, under current case law, qualify as a public authority. Oliver’s seminal work<sup>113</sup> does much to provide an analysis which moves beyond this stagnant position. She looks at the increasing potential for private law decisions to incorporate

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<sup>109</sup> W v FEI CAS 92/86, 9-4-93, Matthieu Reeb, (ed.), Digest of CAS Awards 1986-1998 (Berne, Editions Stämpfli 1998) pp 161-171 (Rasquin, Klimke, Sutter) cited in Soek (n 104) 152.

<sup>110</sup> See for instance, Ian Dennis, *The Law of Evidence*, 4<sup>th</sup> Edn., (London: Sweet and Maxwell 2010) 473-474.

<sup>111</sup> See *Customs and Excise Comrs v City of London Magistrates’ Courts* [2000] 1 WLR 2020 2025, *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354, *Clingham v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 (17 October 2002), *Re Doherty* 2008 UK HL.

<sup>112</sup> Appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold and Kirsty Milczarek (10/04/12) available at <http://www.britishhorseracing.com/resources/about/whatwedo/disciplinary/disciplinaryDetail.asp?item=096634> (accessed on 06/11/12) (see also Appendix 2).

<sup>113</sup> Oliver (n 8).

fundamental rights and judicial review principles including the rule against bias. This is a novel approach, but is very broad in its context; sports cases are considered, but overall there is no intention in Oliver's work for there to be an overt sport focus in the book. This research, however, takes Oliver's ideas and applies them directly to equine sports. This work is carried out in light of judicial decisions that firstly acknowledge a supervisory jurisdiction over sporting disputes<sup>114</sup> and secondly are examples of human rights principles 'leaching' into a private law claim<sup>115</sup>. Both tend to bear out Oliver's hypotheses. This, in turn, sounds a warning note, hitherto little heard, that should any serious inequities be demonstrable in the regulation of equine sports, a challenge based on breach of fundamental rights is no longer impossible.

Turning to the existing literature more widely, which does feature horses and regulation directly, some have examined the harshness of such as the strict liability rule in horse sport. Herlin-Karnell acknowledges that 'horses are special and so is sport'<sup>116</sup>. Her approach is to analyse the true degree to which sport has 'specificity' in EU law<sup>117</sup> and she concludes that after cases like *Delige*<sup>118</sup> and *Bosman*<sup>119</sup>, 'specificity' is further limited. Herlin-Karnell finds that these are the only sports 'that involve[s] two athletes: the horse and rider'<sup>120</sup> and this chimes very much with a similar theme in this thesis. Her view is that, following from this, EU law might offer an alternative route to mitigating the draconian outcomes of some findings based on strict liability. It is correct that the right to a fair trial is a human right protected by the Charter of Fundamental Rights<sup>121</sup>, it follows therefore, as she says, that a disciplinary finding by the FEI (or by extension the BHA) could be challenged under Art. 49 as disproportionate. This is especially so when the offence is based on what both sides agree is most likely to be inadvertent contamination. Examples of this situation being the *Al Eid and Sharbatly* case and the Queen's horse *Estimate*, both of which feature later in this thesis. Herlin-Karnell has rightly interpreted that ECJ

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<sup>114</sup> *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB)

<sup>115</sup> *Bank Mellat v HM Treasury (No 2)* [2014] AC 700

<sup>116</sup> Ester Herlin-Karnell, 'EU sports law and the equestrian world: a galloping area of increasing importance' (2013), *International Sports Law Journal*, 13: 168

<sup>117</sup> Article 165, Treaty of the Functioning of the European Union (TFEU).

<sup>118</sup> *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL* (2000), Joined Cases C-51/96 and C-191/97.

<sup>119</sup> *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995), Case C-415/93.

<sup>120</sup> Herlin-Karnell (n 116) 170

<sup>121</sup> European Union Charter of Fundamental Rights (2000), Article 47.

jurisprudence points to the charter having enough scope to control the activities of organisations beyond member states and institutions, by inference, an SGB<sup>122</sup>.

The limitations in Herlin-Karnell's paper are, however, considerable. She does not discuss how the 'proportionality test' might work. That could be done by analysing cases already decided under current rules, but with an overlay of her hypothesis. There are also no concrete examples of Herlin-Karnell's test being applied in cases where the challenge is to a tribunal run by any non-state actor, never mind an SGB or ISF. The most significant flaw in Herlin-Karnell's approach is that she ignores the different governance arrangements for horse racing and equestrianism. Instead, the entire argument is conducted under the general heading of 'equestrianism'<sup>123</sup>. This is a mistake which means this area of sport cannot have been accurately analysed. There is no direct equivalent of the FEI in horse racing. The BHA's jurisdiction ends at the UK border; it is respected by other racing SGBs as an integrity management world leader<sup>124</sup>, but there is no true ISF for horse racing<sup>125</sup>. Furthermore after what could still be a 'hard' Brexit<sup>126</sup>, no EU Treaty provisions will apply, and even with a 'soft' Brexit, there are too many potential variables for Herlin-Karnell's treatment to be considered complete. Her work can therefore best be characterised as an unproven hypothesis rather than a full discussion<sup>127</sup>. This is something she acknowledges herself, with the words '[c]learly this is an area that needs to be researched further', in particular with regard to a reconciliation with animal protection principles<sup>128</sup>.

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<sup>122</sup> Herlin-Karnell (n 116) 174.

<sup>123</sup> *Ibid.* 168.

<sup>124</sup> Para. 1.9, Neville Review Executive Summary – BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 28/10/16).

<sup>125</sup> The International Federation of Horse Racing Authorities (IFHRA) does attempt to provide some consistency in racing governance across the globe but it does not have the true status of an ISF.

<sup>126</sup> Joe Watts, 'Theresa May indicates 'Hard Brexit' and dismisses free movement deal to secure single market access', *Guardian Online* (London: 2 October 2016) available at: <http://www.independent.co.uk/news/uk/politics/theresa-may-hard-brex-it-soft-article-free-movement-deal-single-market-access-a7341886.html> (accessed on 28/10/16).

<sup>127</sup> See also Jonathan Merritt, 'Don't Look a Gift Horse in the Mouth' – Regulating for integrity, what equestrianism can learn from Thoroughbred racing' (2017) *International Sports Law Journal*, Vol.16, Issue 3, pp 198–216.

<sup>128</sup> Herlin-Karnell (n 116) 174.

Over simplification is not the only possible limiting factor in the current literature; generally academic research that directly focuses on the governance of equine sports is overwhelmingly limited to one sport involving horses or another. For instance, Wendt's work looking at the *Fédération Equestre Internationale* (FEI)<sup>129</sup> is specific to the governance of the Olympic equestrian sports, whereas Vamplew is concerned with integrity in horse racing<sup>130</sup>. This is somewhat at odds with sports journalism, which acknowledges to a degree the potential for the same corruption scandal to be a plague on both houses. This thesis is the first and only research to explore the extent to which the distinction between horse racing and equestrianism is illusory and unproductive. The extent to which there is a *lacuna* caused by a failure to recognise this is termed in this work the *interface problem*, and suggestions are made as to how global horse sport governance might be re-imagined, eradicating the effects of these artificial barriers. This would allow integrity to be better countered, but also encourage a consistent response to forthcoming challenges such as cloning. There is no academic work on re-configuring horse sport governance to consider the possibility of a unified ISF across all the equine sports.

### 3.1.2 Gramsci in sport so far

The application of aspects of Gramsci's work to equine sport is a methodology consideration and has been addressed in Chapter 2. In this section, the existing literature on Gramsci and sport will be addressed.

The examination of the social world through horse-human relationships is an expanding area. Often though, this is from the point of view of how equines can be partners in therapy for humans<sup>131</sup> which is less useful as a basis for an examination of sport power structures. In some cases however, the social order is beginning to be examined this way. For instance, to analyse how participants in evening riding school classes are able to be distracted from the inequalities of their workplace power structures by the experience<sup>132</sup>. This is a critique from the left, but is as

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<sup>129</sup> John Wendt, 'The FEI and the Continued Fight against Doping in Equestrian Sport', (2011) *The International Sports Law Journal*, Issue 3-4, 75.

<sup>130</sup> Wray Vamplew, 'Reduced Horse Power: The Jockey Club and the Regulation of British Horseracing' (2003) 2 *Ent. L.*, p104

<sup>131</sup> See Catharina Carlsson, 'Mentalizing and Emotional Labor Facilitate Equine-Assisted Social Work with Self-harming Adolescents', (2015) *Child and Adolescent Social Work Journal*, Vol.32, Issue 4, pp 329–339.

<sup>132</sup> David Redmalm, 'The Topsy-Turvy Centaur: The Production of Human Bodies and Equine Minds

yet too limited in scope to be of much more than supplementary benefit to the discourse in this thesis.

For Gardiner, Gramsci's theory of hegemony is identified with the commodification of culture and the creation of 'false needs'. Or, as the Frankfurt School of Political Thought has it, that the masses are seduced into compliance with the capitalist societal framework by the attraction of superficial and unnecessary commodities. Increasingly packaged and branded sporting entertainment is one prominent example of those commodities<sup>133</sup>. The word 'sport' itself comes from the Latin verb 'dēportō' which meant 'to carry away or banish'. This is because the activity carried the player or spectator away from every day cares and concerns, and thus sport has long been open to exploitation for those who would prefer the populace was passionate about, say, football rather than politics. As Karen and Washington have it '...the collective passion towards sports distracts people from the vagaries and exploitations of everyday life: When the workday is over, I can root for my beloved Rangers/Giants/Titans and not think about my nasty boss'. Furthermore, they maintain that ideological hegemony means the 'major belief systems of the society are sufficiently accepted by the populace that the ruling class can be said to have the *consent of the governed*'<sup>134</sup>. Most of the literature carrying out this analysis however applies Gramsci's ideological hegemony to relationships that sport has with its external world. Commentators speak of the way sport is used by society's ruling class as a commodity to seduce the ruled into an acceptance of capitalism. They are concerned with the way that sport's ruling class can leverage the power of that branded commodity to secure favourable treatment over the masses without much protest from them.

Sports are, however, in many respects 'little societies'; they have constituents, the sports participants, they have a governance system at local, national, and very often, international level, and these operate more or less under a democratic system. There are, therefore, within each sport the 'ruled' and the 'rulers', albeit that it is usually possible to belong to both classes and indeed to move between them. Usually, but not always, such movement is from the 'ruled' to the

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in Riding School', Conference Proceedings – *Equine Cultures in Transition* – Royal Swedish Academy of Agriculture and Forestry, Drottninggatan 95B, Stockholm, Sweden, 27<sup>th</sup> to 29<sup>th</sup> October 2016.

<sup>133</sup> Gardiner (n 80) 226-227.

<sup>134</sup> Karen and Washington (n 23) 21.

‘rulers’ at the end of a participant’s competitive career. With that in mind, it becomes apparent that the existing literature has not fully attempted to study the relationship between the rulers and the ruled *within* sport, and especially within equine-based sport. Further, the particular suitability of a Gramscian analysis to the regulation of equine sport in part comes from the fact that a number of actors at all levels in the sports belong to the upper levels of the traditional societal order. This has been explored more fully in Chapter 2.

With the foregoing in mind, this research examines ways in which the harshness of the strict liability rule could be mitigated, or even rendered redundant. Introducing the current fault arguments at the liability stage and regulating rather than prohibiting PEDs are considered. Ministerial guidance intended for the Bribery Act 2010 is examined in detail and used to postulate a new equine sport ‘due diligence’ defence in addition. None of these ideas has been the subject of academic commentary before in relation to equines. Further, a recommendation in the 2008 Neville Report<sup>135</sup> on horse racing, and which up to now has only been considered in relation to that sport, has been evaluated for its suitability for all sports, something which has never been attempted before. This recommendation concerned the re-writing of disciplinary regulations around a set of principles, rather than specific detailed provisions. This idea has been further developed in this research by considering the methods of interpretation, other than versions of the literal rule, which might beneficially be employed to apply this new type of sports regulation.

### **3.2 Original contribution to the body of knowledge**

In summary of the previous discussion, there are several key areas where this research provides an original contribution. In an overall sense, no absolute deconstruction of how a sport is regulated has been completed to the detail presented here. In doing so, Gramscian thinking has been employed in a new way to analyse the sporting structures and processes themselves, rather than as a way to demonstrate how sport can be used as part of the coercive process in wider society under which capitalism thrives. Using a corporate governance paradigm influenced by

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<sup>135</sup> Neville Report Executive Summary available at: BHA Press Releases: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 29/07/15).

Marx and Gramsci, the subjective nature of sports governing bodies' rules is kept in mind in analysing both the regulations themselves, and to demonstrate how perceived blocks to radical change could be addressed.

Furthermore, neither the evolving social construct of the horse, nor the terminology found in SGB regulations and emanations of CAS relating to the horse *qua* athlete, have been fully analysed. This is a key omission as consideration of the relevance of these concepts to the way that horse sport is regulated is fundamental. Secondly, having settled on a workable definition of *lex sportiva*, in the context of equine sports, for the first time it is proven that there is no appreciable consistency or coherence in regulation and disciplinary matters across the eighty or more horse sports that exist. The *interface problem* is a term first coined in this research to point out how that inconsistency produces *lacunae*. This is established by analysing in depth the regimes of the FEI compared to the BHA, which produces examples of inconsistency from both the code-compliant and non-code compliant parts of the sector. Having established that 'ruled' and 'rulers' are terms that equally apply to SGBs as well as wider society, the steadfast reliance on strict liability in equine sports is examined in that context for the first time. In particular, the special inequities which pertain to the horse-human athlete team have not previously been adequately analysed. Furthermore, having regard to Gramsci's view of the tendency of the ruling class to give some ground towards reform, but rarely in a fundamental sense, the adequacy of the many reviews in the equine sector is examined in that new light.

Finally, having decoded the genome of the equine sports sector fully, a new way of drafting regulations is taken from one review into horse racing and extrapolated for the first time to prove that it could fundamentally alter for the better the way integrity in equine sports is regulated. In order to facilitate that change in a consistent way ignoring the artificial distinctions between equine sports in the *status quo*, a new collaborative structure is proposed across the sector for the first time.

## Chapter 4 – The new social construct, the horse *qua* non-human athlete

*‘Far, far back in our dark soul the horse prances’.* (D H Lawrence)

### 4.1 Why re-imagine the horse?

The preceding sections have introduced the potential concept that both the governance of horse sport and even the horse itself are social constructs. This chapter concentrates on the second contention, and why it matters in relation to answering the research question. The special relationship built within a team of two athletes from two different species has also already been postulated earlier as being of fundamental importance to this research. There is evidence both from FEI documentation itself, case law emanating from its rules, and academic literature that this unique sporting relationship is conceded within equine sport. The fact that this relationship is accepted, yet regulations are applied to the horse which in substance and form differ little from those applied to human athletes, is however at odds with this acknowledgement. The question is whether the stated recognition is just lip service to the concept, or whether it has real practical meaning.

For Gramsci, Marx created a *weltanschauungen* to found a new historical epoch<sup>136</sup>, a somewhat grandiose term to use of a new conception of the humble horse perhaps, but an analogy with the process is possible. If the horse can be re-imagined as a non-human athlete, rather than as an extension of the capabilities of the rider, and if this has practical rather than purely philosophical implications, this is a key step in establishing the need for a new *weltanschauungen* for equine sports. The way would then be open to begin problematising the structures by which equine sport is governed, given the real position the horse occupies in sport and in wider society. Animal rights issues aside for the moment, the main purpose of this research is to debate the effect on *human* athletes and stakeholders of the current system of regulation and governance of *equines*. If there are basic flaws in that system, human riders, jockeys, owners, and trainers will potentially be victims of injustice. That said, the purpose of some of the regulation is to cater for animal welfare, thus these issues do come into play at the margins of the discussion.

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<sup>136</sup> Gramsci (n 18) 381.



The arguments employed here run counter to the perceived view that the horse is at best a quaint reminder of our agrarian past, an anachronism, or utilised in a

**Figure 2 – A horse being hunted in an early cave painting.**

minority interest sport. It is true to say that the horse has significantly diminished as a source of physical power capable of being utilised in industry, agriculture, or warfare. This is too crude a measure of the importance of the horse or as an indicator as to how developed societies socially construct the



horse. For instance, one example to be studied is the Clydesdale Heavy Horse. This breed is no longer in use in any but the smallest numbers as a tractor unit on farms, its contribution to the economy is vastly diminished in this way. The breed is, however, central to the Budweiser beer advertising effort, and some 250 are maintained by the company for advertising or promotional public appearances and are synonymous with the brand. The global economic impact of the breed, therefore, cannot simply be measured by muscle power. The breed may not be a common visual presence in the fields and lanes, but it remains an icon on the TV screens. This research finds the horse to be a recurring and important feature in modern culture by its inclusion in film, TV, and book storylines. This does, at least, provide a wider view as to how the horse now makes a contribution to ‘UK plc’.

#### **4.1.2 The horse and society**

Most, if not all, research on sports integrity – in particular doping – focuses on human athletes<sup>137</sup>. Equestrian sport, and even horse racing, despite their collective significant contribution to the

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<sup>137</sup> For example; Jack Anderson, ‘Doping Sport and the Law: Time for a Repeal of Prohibition?’ (2013) *International Journal of Law in Context*, 9,2 Cambridge: CUP 135-159, Michael Beloff ‘Drugs, Laws and Versapaks’ in *Drugs and Doping in Sport*, (London: Cavendish 2001), Bob Goldman and Ronald Klatz, *Death in the Locker Room 2*, (Chicago: Elite Sports Medicine 1992) 23, Jason Lowther (2001) ‘Criminal Law Regulation of Performance

UK economy, have not received sufficient academic attention. Sports involving human athletes have been considered of overwhelming importance to society, and equine-based sport relegated to a side-line in research terms. The case in this chapter is important because the impact is on *human* competitors and other sports stakeholders from the lack of relevant equine-focused research of sufficient rigour. The horse species now shares a unique and special relationship with humankind, entwined as it is with our own civilization's development. The three main themes in this chapter are the emergence of the special, interdependent relationship which is now essential for equine sport to function at all; the place of the horse in contemporary culture which feeds into the current social construction of the horse as athlete; and the utilisation of the special relationship for military power. This last point is relevant because much of equine sport – such as three day eventing and polo – has strong military roots.

#### 4.1.3 The early historical context and the birth of the special relationship

The relationship between horse and man reached a pivotal moment around 3000 BC where it began to be used for transport<sup>138</sup>. Prior to this, it was exclusively hunted for food and clothing. In early cave paintings, the horse can clearly be seen being brought down with spears and arrows (see Fig 2). At the point when *homo sapiens* realised that *equus ferus caballus* could be best utilised for carrying and drawing loads, the horse population was verging on extinction. By the end of the beginning of the 20<sup>th</sup> century, the equine subspecies of the quagga<sup>139</sup> (*equus quagga quagga*), Eurasian wild horse (*equus ferus ferus*) and Przewalski's horse<sup>140</sup> (*equus ferus Przewalskii*) had in fact been hunted to extinction in the wild. Over time however, the relationship began to approach the symbiotic as civilization became more dependent on genuine horse power, a world away from the hunter-prey correlation of prehistory. The horse has

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Enhancing Drugs' in *Drugs and Doping in Sport* (London: Cavendish 2001). Antonio Rigozzi, Gabrielle Kaufmann-Kholer, and Georgio Malinverni, 'Doping and fundamental rights of athletes: Comments in the wake of the adoption of the World Anti-Doping Code' (2003) 3 ISLR 39, 43, Julian Savulescu, Bennett Foddy and M. Clayton, 'Why we should allow performance enhancing drugs in sport' (2004) Br J Sports Med, 38: 666, Stephen Weatherill, 'Anti-doping revisited – the demise of the rule of 'purely sporting interest'?' (2006) 27 *European Competition Law Review* 645-657, Roger Welch, 'A snort and a puff: Recreational drugs and discipline in professional sport' in *Drugs and Doping in Sport* (London: Cavendish 2001).

<sup>138</sup> Juliet Clutton-Brock, *Horse Power: A history of the horse and the donkey in human societies*, (London: Natural History Museum Publication 1992) 67-68. See also H. B. Barclay, *The Role of the Horse in Man's Culture*, (London: J. A. Allen and Co Ltd. 1980) 25, cited in Crossman (n 42).

<sup>139</sup> See 'The Quagga Project' [www.quagga-project.org](http://www.quagga-project.org) (accessed on 27/11/14).

<sup>140</sup> See The International Union for Conservation of Nature 'Red List' [www.iucnredlist.org](http://www.iucnredlist.org) (accessed on 27/11/14).

therefore for some centuries been reliant on man for its survival as a species, and in turn has been pivotal in the development of warfare, agriculture, industry, culture, and commerce.

#### **4.1.4 Horses and humans, partners in industrial and commercial development**

In historical terms, because of its relative cost, the horse was an important chattel and features in the development of commercial law. Famously, Coke opined that the payment of a lesser sum could never be satisfaction of a greater sum in terms of debt under a contract, however that a gift of a 'horse, hawk or robe' might be good consideration as an alternative to money because of its potential extra usefulness to the plaintiff<sup>141</sup>. For Swain, horse sales are a useful way of providing a valuable insight over a long period into the development of the law on defective goods '...for of all the chattels, the purchase of one of this sort, is most likely to be the purchase of a suit.'<sup>142</sup>

Swain goes on to argue that the trade in horses came to influence the development of consumer law over a century-and-a-half because of the sheer volume of transactions over that time period and the opportunities the attendant increase in disputes gave for the development of jurisprudence<sup>143</sup>. In the present day, the UK horse industry as a whole, taking account of feed, equipment, and clothing supply makes a significant contribution to the UK economy. In January 2010, a report by Deloitte accountants, commissioned by the bookmakers Ladbrokes found that 15% of horse racing's annual income comes from betting, itself a £6 billion industry<sup>144</sup>. In addition, all commercial activity to do with horses, measured in 2008, was estimated to exceed £7 billion, roughly the size of the entire UK farming sector. The industry also directly employs 70,000 people, and there are further estimated to be a million horses in the UK owned cared for by around half a million people. Around 4.3 million people are classified as riders in the UK

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<sup>141</sup> *Pinnel's Case* [1602] 5 Co. Rep. 117a

<sup>142</sup> Swain (n 79) 282.

<sup>143</sup> *Ibid.* 295.

<sup>144</sup> 'The Full Picture – Measuring the economic contribution of the British Betting Industry, 2<sup>nd</sup> Edn' published by the Association of British Bookmakers Ltd available at [http://abb.uk.com/wp-content/uploads/2014/09/The\\_full\\_picture-\\_2nd\\_editionMeasuring\\_the\\_economic\\_contribution\\_of\\_the\\_British\\_Betting\\_Industry\\_\\_March2013\\_HI-RES.pdf](http://abb.uk.com/wp-content/uploads/2014/09/The_full_picture-_2nd_editionMeasuring_the_economic_contribution_of_the_British_Betting_Industry__March2013_HI-RES.pdf) (accessed on 04/06/15).

with a little less than half riding at least once a month. This is a greater participation popularity than that sustained by cricket, rugby, or fishing<sup>145</sup>.

#### 4.1.5 The horse and culture

The horse features in the earliest known work of European literature. Achilles converses with his chariot horses on the eve of battle in Homer's *The Iliad*<sup>146</sup>, exhibiting an early example of the anthropomorphism so common today. There are biblical references to war horses as well, which feed into the way that the horse is represented in societies developing in the Christian tradition<sup>147</sup>. For O'Daniel-Cantrell, waging war in the time of the Kingdoms of Judah and Israel was heavily dependent on horses<sup>148</sup>. It is unsurprising then that both Old and New Testament imagery designed to evoke notions of a righteous army vanquishing the forces of evil tended to employ the device of a horse. The Four Horsemen of the Apocalypse – famine, war, pestilence and death – all now have a place in popular culture as Halloween costumes, rock music, and tattoo art<sup>149</sup>. Thus, horses have further colonised popular culture by being represented at the very heart of Christian theology as a metaphor. The use of metaphors from the Bible to explain social constructs more generally is a well-established area of research<sup>150</sup>.

The horse has official recognition in some contexts as part of 'intangible cultural heritage', especially where they are an important part of indigenous culture. The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage for example provides a framework for protection<sup>151</sup>. The *Cadre Noir* French classical riding school has such protection, and in 2015 the Spanish Riding School of Vienna applied for the same status.

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<sup>145</sup> Crossman (n 42) 17-19.

<sup>146</sup> Book XIX of Homer's *Iliad*, the written version is usually dated to around the 8<sup>th</sup> century BC.

<sup>147</sup> Job 39 vs 19-25 NIV, see also 2 Samuel c.8 v.4 and 1 Kings c.4 v.26 NIV

<sup>148</sup> Deborah O'Daniel-Cantrell, *The Horsemen of Israel: Horses and Chariotry in Monarchic Israel (Ninth-Eighth Centuries B.C.E.)*. History, Archaeology, and Culture of the Levant 1. (Winona Lake: Eisenbrauns 2011) 37.

<sup>149</sup> See also the Four Horsemen used as a metaphor more recently in sculpture: Ellis-Petersen, H. (2015) 'Underwater sculptures emerge from Thames in climate change protest', The Guardian Online, available at <http://www.theguardian.com/artanddesign/2015/sep/02/underwater-sculptures-thames-london> (accessed on 03/09/2015).

<sup>150</sup> See for instance, Helena Kennedy, *Eve Was Framed: Women and British Justice*, (New York: Vintage Press 1993).

<sup>151</sup> See Sarah Sargent, 'Unfulfilled Promises: Safeguarding the Horse Culture of American Indians', (2014) *Transnational Dispute Management*, Vol. 11, Issue 2.

The horse has made significant appearances in classical literature. Prior to Darwin's work on evolution, the species was considered man's closest relation in the animal kingdom<sup>152</sup>. As such, it is unsurprising that Jonathan Swift used the horse as a metaphor for civility and rational behaviour in his satirical work 'Gulliver's Travels'<sup>153</sup>. Considering poetry, for Shakespeare riding a horse had an almost spiritual quality, '[w]hen I sit astride him, I soar, I am a hawk. He trots on air...' <sup>154</sup> Much more recent poets have reinforced this mystical element to the developing social construction, for instance Duncan's poem, 'The Horse!' – '[a]ll our history is his industry; we are his heirs, he our inheritance'<sup>155</sup>.

The horse is an enduring cultural icon and statues celebrating triumph in a society's history have frequently been of famous humans and also their horses. The Brandenburg Gate in Berlin and the statue of Boudicca adjacent to 'Big Ben' for instance<sup>156</sup>. The horse in sculpture has a very long history, sometimes the scale is breathtaking such as the 110-metre-long Bronze Age Uffington White Horse carved into an Oxfordshire hillside. Some 3,000 years later, the horse is a basis for the creation of a massive art installation dominating the Scottish skyline. The 'Kelpies', the heads of two mythical horse spirits, each weighing 400 tonnes and standing 35 metres high. These are deliberately based on one of Scotland's best-known breeds, the Clydesdale. This is because of the strength, history, and familiarity it represents<sup>157</sup>. It is no accident either that the breed is still extensively used by Budweiser in advertising<sup>158</sup>. The Clydesdale, like many modern horse breeds, still works for a living, but in a totally different way. Now it enters our collective conscious through beer commercials worth many millions of dollars. For Witkowski, the company makes a deliberate effort to associate itself with the breed <sup>159</sup> but now claims it as an

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<sup>152</sup> Swain (n 79) 283.

<sup>153</sup> Jonathan Swift, *Gulliver's Travels*, (Oxford: OUP 2005) 205-209.

<sup>154</sup> Henry V, Act 3, Scene 7.

<sup>155</sup> Lynn Baber 'The Horse' by Ronald Duncan in *Amazing Grays, Amazing Grace: Pursuing Relationship with God, Horses and One Another*, (Mustang: Tate 2010) 54. This poem has been read at the Gala Night of the annual British Horse of the Year Show every year since its inception in 1949.

<sup>156</sup> The horse in sculpture has a very long history, sometimes the scale is breathtaking, the 110-metre-long Bronze-Age Uffington White Horse carved into an Oxfordshire hillside for example.

<sup>157</sup> Severin Carrell, 'Meet the Kelpies, Scotland's giant addition to the UK sculptural skyline' *The Guardian Online* (London: 24 November 2008)

<sup>158</sup> Budweiser Clydesdales <http://www.budweiser.com/clydesdales/history.html> (accessed on 11/02/15)

<sup>159</sup> Michael Witkowski, 'The Bottle that isn't there and the Duck that can't be Heard: The "Subjective Correlative" in Commercial Messages' (2003) *Studies in Media & Information Literacy Education*, University of Toronto Press, Volume 3, Issue 3, 7.

‘American Icon’<sup>160</sup> and teams of them have even featured prominently in two presidential inaugurations<sup>161</sup>. Considering UK cultural icons, the Lloyds Bank black horse is a familiar British High Street sight. The bank’s television advertisements featured a Trakehner stallion from 1988 to 2015. The advertising at the time of writing still highlights the special relationship between horse and man. The bank’s message is that the horse is an enduring metaphor for the bank’s close relationship with its customers<sup>162</sup>. Mass marketing and advertising are very powerful, and play an important part in the development of many social constructions. Here it can be seen influencing that of the horse.

#### 4.1.6 Horses and language

Language is enormously important to the development of social constructs, and the English language is further proof that the horse has invaded and settled the collective societal conscious, often in very subtle ways. We drive to work along dual ‘carriageways’ in cars measured in ‘horsepower’<sup>163</sup> and must beware ‘Trojan’ (horse) viruses on our computers.

We prefer to act in a timely fashion and not ‘shut the stable door after the horse has bolted’, we speak of ‘reining in’ someone’s enthusiasm. Having someone put to their best use might be expressed as ‘horses for courses’.

Of course, ‘only fools and horses work’ to quote both the idiom and the long running BBC television series. These are but a few examples and they no more *prove* the place of the horse in modern society than does the use of ‘status quo’, ‘stadium’ and ‘data’ prove that Latin is thriving. There is however circumstantial evidence for a new social construction here.

**Figure 3 - Modern Indonesian cavalry.**



<sup>160</sup> Budweiser Beer Website, available at: <http://www.budweiser.com/clydesdales/history.html> (accessed on 21/01/15).

<sup>161</sup> *Ibid.*

<sup>162</sup> Lucy Elder, ‘Black horse returns to Lloyds Bank advertising campaign’, *Horse and Hound Online* (29 June 2015) available at <http://www.horseandhound.co.uk/news/lloyds-bank-black-horse-250-anniversary-advertising-campaign-500348> (accessed on 07/10/15).

<sup>163</sup> James Watt based his now commonplace measurement of power on the workhorse of the day; One ‘Horsepower’ (HP) is the power required to lift 33,000 pounds by one foot in one minute.

#### 4.1.7 The horse constructed as a quasi-human comrade in arms

Aspects of horse sport are derived from their use in warfare. Polo, in the developed world, was first played by cavalry officers in the British Raj and eventing is derived from the methods used to train cavalry horses. The modern pentathlon, which contains an equestrian phase, is based on the skills that a 19<sup>th</sup> century soldier would have needed to hone<sup>164</sup>. The social constructivist argument is that, for the purposes of sport regulation, a horse is more than a piece of equipment, but not *parri passu* humankind. A treatment of how the construct developed because of the military use of equines is therefore useful. The first records of chariot horses used in warfare are from China in 2300 BC<sup>165</sup>. The military use of horses as a weapon of war, or at least as *materiel*, has also continued much later than is generally realised. A considerable amount has been written about the use of the horse in the First World War, especially since the publication of Michael Morpurgo's book 'War Horse'<sup>166</sup> and the 100<sup>th</sup> anniversary of the start of that conflict in 2014. For Butler, the Great War was the last conflict in which the horse played a major role<sup>167</sup>. The 'war to end all wars' was responsible for another paradigm shift in the social construction of the horse, at least in the UK. This country was dependent on real horsepower until 1914, but with virtually all of its workhorses conscripted, mechanisation had to happen and quickly<sup>168</sup>. This marked the beginning of the end of the construct of the horse as an agricultural and industrial power source. That said, the Second World War was not the truly mechanised war of popular belief, the German army in particular, industrialised but lacking the mass production capabilities of the Americans, relied on 1.1 million horses to move its military<sup>169</sup>. The modern use of the horse in military terms is largely ceremonial, but the US military still publishes a guide for the use of its special forces required to utilise pack horses in the roughest terrain<sup>170</sup>. They were so deployed in Afghanistan against the Taliban, and there is now a recognition that warfare in the

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<sup>164</sup> The Modern Pentathlon, introduced by Pierre De Coubertin in 1912 essentially as a test of the skills a 19<sup>th</sup> Century cavalry soldier would need, see [www.olympic.org/news/ioc-executive-board-recommends-25-core-sports-for-2020-games/190772](http://www.olympic.org/news/ioc-executive-board-recommends-25-core-sports-for-2020-games/190772) (accessed on 05/02/15)).

<sup>165</sup> H. B. Barclay, 'The Role of the Horse in Man's Culture', (London: J. A. Allen and Co Ltd. 1980) 31 – 33.

<sup>166</sup> Michael Morpurgo, *War Horse*, (London: Egmont 2007).

<sup>167</sup> Simon Butler, 'The War Horses', (Wellington: Halsgrove 2011), p48.

<sup>168</sup> See generally Butler (n 167).

<sup>169</sup> US War Department Military Intelligence Bulletin, March 1946, p54, available <https://archive.org/details/1946-03IntelligenceBulletin> (accessed on 10/02/15).

<sup>170</sup> Field Manual No.3-05.213 'Special Forces Use of Pack Animals', Headquarters, Department of the Army, Washington, DC, 16 June 2004.

next 20 to 30 years is likely to increasingly involve mounting Special Forces operations in mountainous or jungle terrain. For this reason, the United States Marine Corps Mountain Warfare Training Center equips troops to use horses for ‘insertion’ at remote strategic locations<sup>171</sup>. Even today, one of the most well-equipped armies in Southeast Asia, that of Indonesia, maintains small cavalry units such as the *Detasemen Kavaleri Berkuda*. These are for use in difficult terrain (see Fig. 3)<sup>172</sup>.

For this research, however the most important issue is the way that the horse was historically constructed by both troops and high command so as to demonstrate how that has carried through into modern horse sports. The horse tended to be constructed by soldiers as a comrade, rather than just as part of the equipment of war<sup>173</sup>. The particular relationship between a soldier and his mount was captured in a contemporary painting, where a private comforts his dying horse, entitled ‘Goodbye Old Man’<sup>174</sup>. ‘Pals’ by CT Howard<sup>175</sup> featured a soldier and his horse, as did ‘The Wounded Chum – a case for the Blue Cross’<sup>176</sup>. The use of language was carefully chosen to elevate the war horse to the status of ‘brother in arms’, for Flynn, writing about Matania’s ‘Goodbye Old Man’, ‘...there is nothing more the soldier can do, but he still puts himself in mortal danger to say a last goodbye to a faithful comrade’<sup>177</sup>. Flynn argues that this type of portrayal was part of a wider theme; that of providing, often false, comfort to the population at home<sup>178</sup>. Again, there was a practical use to this developing construction, echoes of which have passed through into equine sports. Trust between rider and mount, driver and team, and vice

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<sup>171</sup> Jim Michaels, ‘New horsepower for war zones: Special Forces saddle up’, USA Today, 22 June 2014) available at <http://www.usatoday.com/story/news/nation/2014/06/22/horses-marines-afghanistan/10744395/> (accessed on 10/02/15)

<sup>172</sup> Indonesian Army, Cavalry Website, available at: <http://denkavkud-pussenkav-tniad.mil.id/kata-sambutan-dandenkavkud-pussenkav/> (accessed on 06/10/15)

<sup>173</sup> There is an especially striking and elaborate example of an inter-species war memorial in Confederation Park, Ottawa, Canada, dedicated to animals in war, but particularly horses and mules. See also the 2014 ‘Lest we forget’ donation campaign by the Brooke equine welfare charity ([www.thebrooke.org](http://www.thebrooke.org) accessed on 18/11/14).

<sup>174</sup> ‘Goodbye Old Man: An Incident on the Road to a Battery Position in Southern Flanders’ painted by Fortunino Matania 1916.

<sup>175</sup> ‘Pals!’ by British artist C.T. Howard. Postcard printed and published by J. Salmon, Sevenoaks, England.

<sup>176</sup> ‘The Wounded Chum – a case for the Blue Cross’ painted by Stanley Wood.

<sup>177</sup> Jane Flynn, ‘Sense and sentimentality: A critical study of the influence of myth in portrayals of the soldier and horse during World War One’ (2012) *Critical Perspectives on Animals in Society* [conference proceedings], 28.

<sup>178</sup> *Ibid* 25.



versa meant survival was more likely than if no such faith existed. The British Army knew this and nurtured the relationship<sup>179</sup>.

#### 4.1.8 The ‘special relationship’ in social science research

Social scientists have taken the debate to the point of considering whether the construct of the horse has gone beyond ‘athlete’ to that of ‘athlete- celebrity’. There is no need to make that leap in the context of this thesis, but it is useful to look at how social science has considered the horse *qua* athlete before that continuation. Gilbert<sup>180</sup> explores the social processes that have led to the re-classification of the very best specimens of horses as athletes in equestrian sport. Gilbert concentrates on a specific breed for analysis. In exploring the *sport pony* as an athlete, one of the theoretical resources utilised is work by Latimer and Birke<sup>181</sup>. The meanings generated around the identity of a specific type of horse are the culmination of specific breeding practices and the changing use of the horse feeds into this identity transformation. For Latimer and Birke, the figure of the horse is ‘complex and polysemic...an effect – of the partial connection between nature, culture and technology’<sup>182</sup>.

For Sigman, ‘[s]ports matter in society. The phrase ‘It’s only a game’ is patently false’<sup>183</sup>, sport is a socio-cultural phenomenon<sup>184</sup>. This is also true when the sport features both human and non-human athletes.

Turning to horse-human relations<sup>185</sup>, relationships are in large part built on the communication between the parties of different species. Proops and McComb have established that ‘cross

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<sup>179</sup> See M. C. Dierendonck and Debbie Goodwin, ‘Social Contact in Horses: Implications for Horse-Human Interactions’, in F. H. de Jonge and R. van den Bos, (eds) *The Human—Animal Relationship*, (Assen: Van Gorcum 2005) and S. M. Keaveney, ‘Equines and their Human Companions’ (2008), *Journal of Business Research* 61: 444-454 cited in Flynn (n 177) 27.

<sup>180</sup> Gilbert and Gillett (n 97) 634-635.

<sup>181</sup> Joanna Latimer and Linda Birke, ‘Natural relations: Horses, knowledge, technology’ (2009) *The Sociological Review* 57(1) 1–27.

<sup>182</sup> *Ibid.* 8.

<sup>183</sup> Shayna Sigman, ‘Are We All Dopes – A Behavioral Law and Economics Approach to Legal Regulation of Doping in Sports Symposium: Doping in Sports: Legal and Ethical Issues’ (2008), *Marquette Sports Law Review*, Vol. 19:1 184.

<sup>184</sup> *Ibid.* 204.

<sup>185</sup> See for example, Jessica Lampe and Jeffrey Andre, ‘Cross-modal recognition of human individuals in domestic horses (*Equus caballus*)’ (2012) *Anim Cogn.* Jul; 15(4):623-30, Konstanze Krueger et al. ‘Horses (*Equus caballus*) use human local enhancement cues and adjust to human attention’ (2011), *Anim Cogn.* Mar; 14(2):187-201, Yuri

modal'<sup>186</sup> individual recognition is not just as previously thought, a human only trait. The researchers chose horses instead of other animals because of the unique relationship they have with our species'<sup>187</sup>. This relationship has a practical use and horses in therapy is well established, the international term 'hippotherapy' having been coined<sup>188</sup>. The therapeutic benefits include 'fostering socialisation, increasing a withdrawn person's responsiveness and animation, giving pleasure [and] enhancing morale'<sup>189</sup>. This is also relevant for sport as equestrianism is now a well-established part of the Paralympic Games, and for Burgon, '[t]he healing power of horses goes back to an age-old relationship with man'.<sup>190</sup> This research is now widely available<sup>191</sup> and in use in a practical rehabilitation setting<sup>192</sup>.

## 4.2 Conclusion

The purpose of this chapter was to prove by research that to describe the horse as athlete was not just a term of art or glib turn of phrase. It has been established that the horse has become embedded in modern culture as something other than animal, but not human. The re-imagining of the horse is a vital bedrock for the research that follows. This is both because it highlights the lack of adequate research in this area, and because it directly impacts on how regulations on equine participation in sport should be drafted. This is part of the fundamental re-examination of 'equine' and 'governance' that the research question requires.

The horse's place in society is in a process of being renegotiated, but is nevertheless enduring. A covenant of sorts has existed between the species of horse and man for some 13,000 years, a

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Henselek et al. 'Does the stimulus type influence horses' performance in a quantity discrimination task?' (2012) *Front Psychol.* 3:504.

<sup>186</sup> Using two or more senses interacting with each other.

<sup>187</sup> Proops and McComb (n3) 3131.

<sup>188</sup> Riding for the Disabled website available at: <http://www.rda.org.uk/assets/Understanding-Hippotherapy7.pdf> (accessed on 30/10/14).

<sup>189</sup> Anita All et al. 'Animals, Horseback Riding and Implications for Rehab Therapy', (1999) *Journal of Rehabilitation*, Vol 65, 49.

<sup>190</sup> Sheena McKenzie, *Roll over Freud: Rise of animal therapy*, (CNN, 30 November 2012) available from: <http://edition.cnn.com/2012/11/30/sport/equine-horse-therapy-mental-health/> (accessed on 01/02/15)

<sup>191</sup> Hannah Burgon, *Equine Assisted Therapy with At-Risk Young People*, (London: Palgrave Macmillan 2014)

<sup>192</sup> See L. Kaiser et al. 'Effects of a therapeutic riding program on at-risk and special education children' (2006) *Journal of The American Veterinary Medical Association* 228:1, 46-52. See also L. Kaiser et al. 'Stress-related behaviors among horses used in a therapeutic riding program' (2006) *Journal of the American Veterinary Medical Association* 228:1, 39-45.

covenant broken almost exclusively by man<sup>193</sup>. This is the price that *equus ferus caballus* has to pay for survival. Undoubtedly, they need us more than we need them. However, in this chapter it has been argued that we need them far more than is currently acknowledged. The received truth that the horse is a feature of our history, and not the present or future, has been countered. This misconception has led to paucity in social scientific and legal research into regulation and governance of equines in sport.

The special relationship has been evidenced here in a wide range of fields, specifically art, sculpture, literature, social science research, therapy, and training, as well as sport itself. The *quasi* human status considered is further proven by the anthropomorphosis of the horse, which is a common feature in film, television, written fiction, and marketing. There is then a complex web of themes, ideas, and subtle cues which influence our new conception of the horse as ‘non-human athlete’ in modern society. On this basis, a more complete critique of the regulatory arrangements for horse sport can now be undertaken in the following chapters.

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<sup>193</sup> In contrast to the pre-industrial era when owning a horse might have been an unwelcome necessity, most horses are now owned by those with a genuine affection for them. Despite this the RSPCA has described the level of horse abandonment in the UK seen since 2008 as a ‘crisis’. They have lobbied for legislation, with some success such as the Control of Horses (Wales) Act 2014.

## Chapter 5 - Problematising the governance of equine sport

*'A canter is a cure for every evil'* (Benjamin Disraeli)

### 5.1 Structures, fractures and the *Interface Problem*

The structures and processes in equine-based sport have been developed under the dominant *weltanschauungen*, which this research seeks to critique from a Gramscian perspective. Sports governance is defined as 'the responsibility for the functioning and overall direction of the organisation and ... a necessary and institutionalised component of all sport codes'<sup>194</sup>. The rising importance of sports governance, and the interrelationship between governing bodies and the World Anti-Doping Agency (WADA), is characteristic of the emerging landscape of post a 'Keynesian-Westphalian' conception of international legal order<sup>195</sup>. For Walker, the traditional neat 'territorially coded, mutual exclusivity of jurisdiction'<sup>196</sup> model with legal relationships between those territories, such as international treaties between nation states, has given way. Walker cites WADA as an example of what he calls 'normative co-ordination'<sup>197</sup> with supranational legal orders existing at the private level. To an extent, the nation state – and even the international state-sponsored treaty – is marginalised. For Walker, the proliferation of the new legal orders is likely to continue<sup>198</sup>, for example James and Osborn have added 'IOC law' to the list<sup>199</sup>. For the elite sportsperson, the effect of the private supranational legal order on them as individuals can be far greater than even the domestic criminal law of their nation state. Thus, sports governance is not an esoteric area of study, but part of an emerging web of international legal orders whose importance will only grow.

The governance of sports involving equines is an especially complex area, with many sports governing bodies (SGBs) or international sports federations (ISFs) responsible for a very large

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<sup>194</sup> Lesley Ferkins, David Shilbury and Gael McDonald, 'Board Involvement in Strategy: Advancing the Governance of Sporting Organisations' (2009) 23 *Journal of Sport Management*, 245 cited in Downie (n 48) 5.

<sup>195</sup> Walker (n16) 377.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.* 381-382.

<sup>198</sup> *Ibid.* 373.

<sup>199</sup> Mark James and Guy Osborn, 'The Olympics, transnational law and legal transplants: The International Olympic Committee, ambush marketing and ticket touting' (2016) *Legal Studies*, Vol. 36, Issue 1, March, 93-110.

number of very disparate disciplines. There are eighty equine sports<sup>200</sup> and the BEF alone is responsible for nineteen. Only a small fraction of the global figure come under the auspices of the main ISF, the Fédération Equestre Internationale (FEI).

### 5.1.1 The Fédération Equestre Internationale (FEI)

The FEI is a global ISF which has the three Olympic equestrian sports of showjumping, dressage, and eventing as well as para-dressage under regulation. The FEI regulates sports that differ from one another enormously in almost every conceivable way, except that a horse and human partnership are involved. The sports range from reining – which involves horses and riders in western (quasi-traditional cowboy) attire and tack – performing set patterns at a fast pace on a specially constructed indoor clay-based surface<sup>201</sup> to Horse-ball<sup>202</sup> which is played using English riding techniques<sup>203</sup> and has its roots in the Argentinian national game of *Pato*. The varieties within that range are considerable and have little in common except that they are a test of some tradition of horsemanship, whether astride or driving the horse<sup>204</sup>. Carriage driving in turn has little or no technical common ground with tent-pegging<sup>205</sup> for instance, which requires a horse rider to strike targets at speed with a lance or sword.

In total, the FEI has eight sports under its global governance and two under FEI regional governance. There are 133 national member federations holding 3,400 FEI events worldwide each year. Some 230,000 horses are registered on the FEI database, together with 74,000 human competitors, and there are 6,200 officials under management<sup>206</sup>. The FEI does not govern horse racing or polo, but it has signed a memorandum of understanding with the Federation of International Polo (FIP)<sup>207</sup>.

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<sup>200</sup> Steinkraus et al. (n.1)

<sup>201</sup> Donna Snyder-Smith, 'The Classic Western Rider', (Hoboken: Wiley Publishing 2016) 132-163.

<sup>202</sup> John Nauright and Charles Parrish (eds.) 'Sports around the World: History, Culture and Practice', Vol. 3, (Santa Barbara: ABC-CLIO LLC 2012) 124-125.

<sup>203</sup> British Horseball Website, available at: [www.britishhorseball.co.uk](http://www.britishhorseball.co.uk) (accessed on 19/02/15).

<sup>204</sup> Steinkraus et al. (n1) 202.

<sup>205</sup> British Tentpegging Website, available at: <http://www.britishtentpegging.com/> (accessed on 04/06/15).

<sup>206</sup> FEI database, available at <https://data.fei.org/Default.aspx> (accessed on 19/02/15).

<sup>207</sup> FEI Press release dated 30/03/09 available at <http://www.fei.org/news/fei-and-fip-federation-international-polo-forge-partnership> (accessed on 19/02/15).

### 5.1.2 Horse racing

Horse racing has no single global SGB, but is overseen by a variety of organisations<sup>208</sup> based at national level with each nation operating under comparable but distinct rules. In the UK, the SGB is the British Horse Racing Authority (BHA) formed in part from what is known as The Jockey Club. The International Federation of Horse Racing Authorities (IFHRA) attempts to increase consistency between horse racing authorities, but is not equivalent to the FEI in its form or in how it operates<sup>209</sup>. It administers some international agreements between national racing authorities, but not all nations have signed up to all the provisions drafted, part of the issues to be examined at length later in this chapter.

### 5.1.3 Polo

Polo's FIP currently has 75 member countries<sup>210</sup>. The FIP was created in 1982 and has offices in London and Buenos Aires. The SGB for polo in the UK is The Hurlingham Club, founded in 1875, the first games having been played by Indian Army Officers in Kashmir in 1859. Despite its roots under British colonial rule, the game is now particularly popular in Argentina 'with its vast cattle ranches, a breeding industry able to produce an inexhaustible supply of ponies, enormous fortunes, and a population that learned to ride at the same time as it learned to walk'<sup>211</sup>. The United States has had its own national polo association since 1922.



**Figure 4 - A competitor in a Western riding discipline.**

### 5.1.4 Non-FEI western riding

Western riding (see Fig. 4), as its name suggests, has a great deal of prominence in the North American continent, but is in fact made up of a considerable number of separate disciplines, only

<sup>208</sup> Crossman (n 42) 41.

<sup>209</sup> See also International Federation of Horse Racing Authorities Website, available at: [www.ifhaonline.org](http://www.ifhaonline.org) (accessed on 28/10/13).

<sup>210</sup> International Polo Federation Website, available at: <http://www.fippolo.com/> (accessed on 03/06/15).

<sup>211</sup> Steinkraus et al. (n1) 154.

one of which – reining – is in the FEI fold. These disciplines grew out of the skills required of an American cowboy, still utilised today on remote cattle ranches. Skills include the ability to ‘break’ horses, separate cattle, or stop a horse at canter ‘on a dime’ when faced with an unexpected hazard. These proficiencies would have been honed by ranchers and missionaries as they settled in what is now the south-western United States. The history of modern American horsemen and women began with a mere 34 Andalusian horses brought by Columbus in 1494 on his second voyage<sup>212</sup>, native horses being extinct. For Steinkraus, the traditional, overwhelmingly male, cowboy is surrounded in folklore. The bravery and hardiness, together with an intimate relationship with the horse, is noteworthy as a kind of chivalry reminiscent of ancient codes of valour, an ‘Americanised version of the medieval knight’<sup>213</sup>. There is very little crossover between this and the ‘English’ and ‘Iberian’ disciplines, apart from some limited attempts to meld dressage techniques with reining.

#### **5.1.5 Minority equestrian sports**

Other equine-based sports include harness racing, where a small cart is pulled around a racetrack at no more than a trot; fox hunting, which is more commonly now ‘drag’ hunting in the UK because of legislative changes<sup>214</sup>; and horse-boarding, where a horse and rider pulls a second competitor on a line who in turn is mounted on a large skateboard, or even a small surfboard depending on the location. There are many other minority equine-based sports, but again too many for a full discussion here, except to say that the governance of these sports varies greatly in formality and structure. Some, including fox hunting, have ancient origins and a well-structured national body to accredit the professional riders and their hounds. There are, however, fewer modern participants because of urbanisation and animal welfare campaigning.<sup>215</sup> The variants involving a (volunteer) human quarry still enjoy a degree of popularity during the winter months and are something of a tourist attraction around Christmas and the New Year. Some sports, such as horse-boarding, are too new to have many participants or followers, and have a national

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<sup>212</sup> *Ibid.* 178.

<sup>213</sup> *Ibid.*

<sup>214</sup> The Hunting Act 2004 applies to England and Wales and bans hunting with dogs in most circumstances. A separate Act governs Scotland and the activity is still legal in Northern Ireland. In drag hunting, the hounds follow a pre-laid scent trail.

<sup>215</sup> Steinkraus et al., (n 1) 245.

governance structure in its infancy. Others, including harness racing, are very popular in some countries such as the United States and France,<sup>216</sup> but are relatively unknown in other countries, including the UK. Consequently, while governance mechanisms might be long-established, and tried and trusted in these sports, they will be localised in nature.

## 5.2 What does *lex sportiva* matter to horse sport?

Having established that horse sport as a category contain an enormous diversity of activities, the task is to look at the extent to which different governance – and especially disciplinary structures and process – are compatible with one another. A key contention in the research at this point is that despite the different uses horses are put to, what matters is that horse sport in any form is ultimately the pairing of a human athlete with a non-human athlete. Through that lens, apparent differences in the disciplinary mechanisms sport-by-sport may be counter-productive. With that in mind, an examination will now be conducted into how the sports' governance arrangements relate to one another, the *status quo* in other words.

For many sports lawyers, there is an emerging global body of law for sport, and the term *lex sportiva* has been coined. This section is concerned with whether there is a *lex sportiva* worthy of the name in terms of equine sport, and to consider the importance of that discussion to the governance of equine sport. It may be that there is, in fact, an emerging sub-genre of equine sports law. It is outside the scope of this thesis to consider the disciplinary proceedings and 'jurisprudence' of all eighty or more equine sports, or even a significant selection of them. Instead, it is intended to discuss in the main the major players in this sector; namely the FEI sports, because they include the Olympic equine disciplines, and horse racing because of its huge turnover, relationship to the gambling industry, and consequent contribution to UK GDP<sup>217</sup>.

The terms 'sports law' and 'sports governance' first need to be carefully disentangled to address the central questions over *lex sportiva*. These terms are often confused and used interchangeably,

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<sup>216</sup> *Ibid.* 223-243.

<sup>217</sup> 'The Full Picture – Measuring the economic contribution of the British Betting Industry 2014 published by the Association of British Bookmakers Ltd, available at [http://abb.uk.com/wp-content/uploads/2014/09/The\\_full\\_picture-\\_2nd\\_editionMeasuring\\_the\\_economic\\_contribution\\_of\\_the\\_British\\_Betting\\_Industry\\_\\_March2013\\_HI-RES.pdf](http://abb.uk.com/wp-content/uploads/2014/09/The_full_picture-_2nd_editionMeasuring_the_economic_contribution_of_the_British_Betting_Industry__March2013_HI-RES.pdf) (accessed on 20/04/17).



but they mean different things. Firstly, we should consider sports governance and how we should study that. Crossman's analysis<sup>218</sup> established that horse sport can function very well with little or no state level interference. The research question requires a Gramscian approach, despite the fact that Gramsci and other Marxists were overwhelmingly concerned with unequal power dynamics between a state and its people<sup>219</sup>. Nevertheless, the same dynamics seem to be at work in sport, and that must be investigated.

Each sport has a regulatory framework with a hierarchy, much like a nation state. There are democratic processes which are modelled on those of an egalitarian state. These processes also seem *prima facie* to be capable of producing similar inequities. For instance, a lack of diversity at the highest governance level in English football which was highlighted in late 2016<sup>220</sup>, is a concern now expressed openly about other UK sports and may result in real sanctions<sup>221</sup>. This position somewhat replicates the concern about the predominance of white males of late middle age in both UK politics<sup>222</sup>, the British judiciary<sup>223</sup> and at executive level in industry<sup>224</sup>. Burrell and Morgan's work<sup>225</sup> suggests that, as in corporate governance, sport governance is 'an emergent social process which is created by the individuals concerned'<sup>226</sup> so it is unsurprising that inequities which appear in the way society is governed are found in sporting societies and their structures developed by the leaders of sport – the 'rulers' – to analogise Gramsci's political theorising. These structures are created in large part to enable sportsmen and women to get on with the business of competing in their sport, much as the proletariat allows itself to be governed by a ruling class so workers can be concerned with day-to-day mundanities. Indeed, society's ruling class has a tendency to encourage this so that there is less likelihood of rejection of the

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<sup>218</sup> Crossman (n 42).

<sup>219</sup> See for instance, Leon Trotsky, *Karl Marx*, (London: Cassell 1940) 34-35.

<sup>220</sup> Roan (n 73).

<sup>221</sup> Andrew Bull, 'Sports Bodies Face Cuts Over Lack of Women in Boardrooms', (London: The Guardian 8 March 2017) 7.

<sup>222</sup> See Pippa Norris and Jonni Lovenduski, *Political Recruitment: Gender, Race and Class in the British Parliament*, (Cambridge: CUP 1995).

<sup>223</sup> Francis Gibb and David Brown, 'Verdict on the judges: Too male, too white, too elitist', (London: The Times 6 July 2011) 1.

<sup>224</sup> Sarah Gordon, 'Women hold just a sixth of senior roles at top UK companies', (London: The Financial times Online, 15 March 2017) available at: <https://www.ft.com/content/0713fe70-18f8-11e6-bb7d-ee563a5a1cc1> (accessed on 15/03/17)

<sup>225</sup> Burrell and Morgan (n 49) 32.

<sup>226</sup> *Ibid.* 28.

*status quo*<sup>227</sup>. In sport the situation is similar, promised major reform rarely, if ever, alters the fundamental power imbalance<sup>228</sup> and athletes are encouraged to accept the rules as they are by those enforcing them and, therefore, have a vested interest in them<sup>229</sup>.

In terms of the existing commentary on *lex sportiva*, Foster makes a distinction between international sports law and global sports law. The former, after Nafzinger, is characterised as ‘an authoritative process of decision-making and legal discipline, international sports law is as much a matter of international law as of sports law’<sup>230</sup>. For Foster, global sports law is ‘a transnational autonomous legal order created by the private global institutions that govern international sport’ and, as such, has the tendency to oppose the rule of law<sup>231</sup>. This actually must only therefore refer to sports governance, because as considered *supra*, sports law is often argued to contain aspects of domestic law adapted to apply to sport. These domestic legal principles are not created by private global institutions, but by national parliaments and the judiciary. This is an example of the difficulties the terminology can create.

Davis posits that three views are at odds with each other in this debate: Firstly, the traditional view is that a discrete sports law does not exist, and that the phrase refers to an amalgam of various substantive areas of the law that are relevant in a sports context. Griffiths-Jones for instance goes as far as to say:

‘[a] moment’s thought reveals that no discrete area of law exists to which can aptly be attached the label ‘sports law’.... the very concept of ‘sport’ embraces many different activities with no discernible common denominator and no obvious definable boundaries. Human activity is subject to the law in all its aspects and sport can plead no special exemption’<sup>232</sup>.

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<sup>227</sup> Karen and Washington (n 23) 21.

<sup>228</sup> See Mark Pieth, *Reforming FIFA*, (Baden-Baden: Nomos Verlagsges 2014), especially – Introduction, ‘Governing FIFA’.

<sup>229</sup> See Coe (n 58) and for commentary on Samaranch’s ‘moral death’ speech see Amos (n 11) 1.

<sup>230</sup> Ken Foster, ‘Is There a Global Sports Law’ in Robert Siekmann and Janwillem Soek, (Eds) *Lex Sportiva: What is Sports Law?* (The Hague: T.M.C. Asser Press 2012) 37.

<sup>231</sup> *Ibid* 35-37.

<sup>232</sup> David Griffith-Jones, *Law and The Business of Sport*, (Haywards Heath: Tottel 2007), Preface.

Secondly, as Gardiner argues<sup>233</sup>, sports law is a separate field of law evidenced by the existence of a separately identifiable body of case law and statute specific to the sports industry. The third view is the moderate one, that while not yet there, sports law may develop into a discrete field of law<sup>234</sup>. Gardiner is persuasive, but the more compelling view is the traditional one, because the law – be it contract, tort, crime, human rights, or arbitral – is no different to that which applies outside sport, but is applied *to* sport. The argument that a distinct *lex sportiva* exists is strongest however when applied solely to the case law emanating from CAS and the relationship between this and the law of various nation states. This jurisprudence is arrived at by a system like no other. There is a unique mixture of common law principles, including strict liability and the concept of precedent, working together with civil code traditions such as the ‘comfortable satisfaction’ standard of proof. Additionally, this is a body of legal reasoning largely of sole interest to sports people, sports lawyers, and academics. However, whether there is a ‘degree of harmonisation on the decision-making procedures of ISFs; regardless of the sport from which the sport arose...’<sup>235</sup> This needs to be reconsidered in light of the fact that major sports, such as English football<sup>236</sup>, Formula 1, and horse racing have in-house disciplinary procedures without recourse to CAS in the normal course of events. This must be an obstacle to referring to CAS as a ‘supreme court’<sup>237</sup> and therefore a limit on the argument that sports law is coherent, which implies ‘complete’. The equivalent would be referring to the jurisprudence of the UK Supreme Court as a coherent body of case law when the citizens of Middlesbrough, Cardiff, and Birmingham, for example, are not subject to it. The consequence of all this is that only sports governance decisions through CAS – and separately the bodies of case law from those organisations not subject to CAS such as the BHA Appeals Board – can be properly termed ‘sports law’. This is at least law unique to sports stakeholders, but for the reasons just given, it is doubtful that it can be termed coherent, which is a major problem for equine sports in particular, as shall be explored.

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<sup>233</sup> Gardiner (n 80) 83-85.

<sup>234</sup> Timothy Davis, ‘What is Sports Law’ in Siekmann and Soek (n 230) 3-7.

<sup>235</sup> Mark James, *Sports Law*, (Basingstoke: Palgrave Macmillan 2013) 52.

<sup>236</sup> *Stretford v The Football Association Ltd & Another* [2007] EWCA Civ 238 regarding the FA’s ‘Rule K’.

<sup>237</sup> WADA: ‘The Court of Arbitration for Sport (CAS) is often referred to as sport’s *supreme court* available at <https://www.wada-ama.org/en/court-of-arbitration-for-sport> (accessed on 21/04/17).

### 5.2.1 Are sporting rules ‘soft’ or ‘hard’ law’?

This is an alternative way to tackle the discourse on what *lex sportiva* actually is. Burrell and Morgan’s ‘emergent social processes’ aptly describe the creation of sporting rules, but the status of these rules should be considered. Greek and Belgian doping rules aside, these regulations are rarely enshrined in parliamentary statute. The effects of these rules, however, may form part of a national jurisdiction’s case law, such as *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB) has done for the UK, *Matuzalem*<sup>238</sup> has for Switzerland, and *Pechstein*<sup>239</sup> has for Germany. These cases ultimately resolve conflicts of laws, however, i.e. conflicts between the laws of a nation state or a supra national body such as the EU<sup>240</sup> and sporting rules. We should then look at where these sporting rules sit on the continuum between ‘soft’ and ‘hard’ law.

Karlsson-Vinkhuyzen and Vihma considered the legitimacy and effectiveness of ‘hard’ and ‘soft’ law. In doing so, they developed an analytical framework to analyse spheres of authority on a continuum from precise and legally binding traditional ‘hard law’ to the softest of ‘soft law’ with its vague aspirational goals<sup>241</sup>. Basing some of their ideas on the work of Abbott and Snidal<sup>242</sup>, they consider that in what they call ‘international legalisation’ there are three criteria; *binding obligation*, *precise wording*, and a provision for some form of *delegation* in the implementation of the law<sup>243</sup>. They further contend that if legal arrangements are weakened along one or more of these dimensions, they enter the realm of soft law. Their work is concerned with nation states as major actors in such as the climate change arena, the Kyoto Protocol, and the UN Framework Convention on Climate Change. Their discussion of soft law as a concept is

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<sup>238</sup> See Lucien Valloni and Thilo Pachmann, ‘Switzerland: The Landmark Matuzalem Case And Its Consequences On The FIFA Regulations’ (2012) available at: <http://www.mondaq.com/x/184712/Sport/The+Landmark+Matuzalem+Case+And+Its+Consequences+On+The+FIFA> (accessed on 21/04/17).

<sup>239</sup> Landgericht München, judgment dated February 26, 2014, file no. 37 O 28331/12.

<sup>240</sup> For instance, Case T-313/02 David Meca-Medina and Igor Majcen v Commission of the European Communities.

<sup>241</sup> Sylvia Karlsson-Vinkhuyzen and A. Vihma, ‘Comparing the legitimacy and effectiveness of global hard and soft law: an analytical framework’ (2009) 4 *Reg and Gov*, 400.

<sup>242</sup> Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) *International Organisation* 54(3), 421-456.

<sup>243</sup> Karlsson-Vinkhuyzen and Vihma (n 241) 402.

nevertheless of great assistance in analysing global sports governance as an example of Walker's 'normative co-ordinations' as international legal orders<sup>244</sup>.

The origins of the concept of soft law are difficult to chart. For Di Robilant, there are two genealogies, one with medieval roots and the other discussed as a set of 'recurrent slogans' voiced by proponents of soft governance where flexibility, adaptability, problem solving capacity, participation, and coping with diversity can best be achieved. Here the much later works of jurists, historians, and legal scholars Savigny, Ehrlich, Gurvitch, and Santi-Romano are pre-eminent<sup>245</sup>. Writing in the context mainly of European law, Di Robilant considers there is a choice to be made between the 'enduring efficacy and normative preferability of traditional hard law mechanisms' and a soft harmonisation calling attention to the merits of soft law<sup>246</sup>. Anderson argues that 'sports law' as a whole is much more than just soft law, however 'sports law addresses a unique set of relations among persons and undertakings involved in the playing and organisation of sport'<sup>247</sup>. Anderson goes on to compare it with family law and health law. Anderson ultimately cites Elhauge's analysis of the coherence of family and health law in 2006 in support<sup>248</sup> and argues that, such as family law, the ordinary rules of contracts, torts, and property are often varied to take account of the special nature of familial relations. Equine sports law is then a basket of legal concepts which when brought together are the full gamut of rights and duties that a sports participant is subject to. The direct comparison with family law is unconvincing, however, as all citizens are subject to family law. Everyone is part of a family however distant and fragmented it might be. Put another way, one cannot opt out of the jurisdiction of the family courts, even if one spends one's entire life fortunate enough to have never needed them. Likewise, health law applies to all, but sports law either contains domestic law that is sometimes applied to sporting cases, or it concerns governance that has no application to citizens unconnected with the sport. These facets make health, family, and sports law quite distinct.

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<sup>244</sup> Walker (n 16) 377.

<sup>245</sup> Anna Di Robilant, 'Genealogies of Soft Law', (2006) *The American Journal of Comparative Law* Vol. 54, No. 3, 501.

<sup>246</sup> *Ibid.*

<sup>247</sup> Anderson (n 102) p25.

<sup>248</sup> Einer Elhauge, 'Can Health Law become a Coherent Field of Law?' (2006) 41 *Wake Forest Law Review* 365.

Where rights and obligations arise from tort or contract law within a sporting context, the contention is that these cases are treated so very differently by the judiciary that they are part of the creation of a distinct species of sports law. For example, if an injury is negligently caused on the field of play – be that the race track or polo field – state sponsored sanctions in the form of damages can ensue, and the transgressing player cannot escape that operation of law just by no longer playing that sport. It is true that some cases appear to suggest a different standard of care is applicable, so as not to interfere with sporting endeavour<sup>249</sup>. This can be considered a matter of interpretation, however the term ‘reckless disregard’ merely indicates the level of evidence required to establish a breach of the standard of care in sporting cases rather than a completely new test<sup>250</sup>. There are, after all, different approaches to the standard of care test applied to other special cases such as the level of inadequacy required to establish a breach in an emergency<sup>251</sup> and with respect to those particularly vulnerable to the risk<sup>252</sup> there is no completely new test in each case.

James does, however, provide some clarity concerning the terms ‘sports law’, ‘global sports law’, ‘international sports law’, and *lex sportiva*, writing:

‘...begin by identifying the various sources of sports law and the jurisprudence that [are] developing...two main groups of sports law can be identified. The first group reflects the application of legal principles by the tribunals granted jurisdiction to hear disputes by the national governing bodies of sport and by international sports federations; these are referred to here as domestic sports law and global sports law. These two sources highlight the desire of these bodies to self-regulate disputes that affect their sports and their claims that they are developing through CAS a completely new branch of law that is often referred to as *lex sportiva*.’<sup>253</sup>

James goes on to say that national sports law, European sports law, and international sports law are sources of sports law that evidence the application of national, European, and international

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<sup>249</sup> Wooldridge v Sumner [1963] 2 QB 43

<sup>250</sup> Caldwell v. Maguire and Fitzgerald [2001] EWCA 1054

<sup>251</sup> Watt v Hertfordshire County Council, [1954] 1 WLR 835

<sup>252</sup> Paris v Stepney Borough Council [1950] UKHL 3

<sup>253</sup> James (n 235) 5.

law together with generally or universally applicable legal principles, such as the jurisprudence of the European Court of Human Rights (ECtHR) to a sports dispute. At least then, sports governance and, in particular, disciplinary rules and awards, can be considered a unique stream of law worthy of the term *lex sportiva*. As shall be evidenced however, the arbitral awards may emanate from a tribunal system that has nothing to do with CAS, and this is important.

### 5.2.1.1 Sport and EU law

In terms of the UK, the impact of EU law in this area going forward is now, to put it mildly, difficult to predict. This is because of the referendum result of the 23<sup>rd</sup> June 2016 and the triggering of Article 50 TFEU in March 2017. There is no clarity as yet whether EU law and/or the jurisdiction of the ECJ will continue in some form or other after March 2019<sup>254</sup>. That said, at the time of writing, there is a clear argument that the operation of EU law is distorted in relation to sport as a result of the ‘specificity of sport’<sup>255</sup>. There are factors which provide the best evidence of a distinct *lex sportiva*, outside that emanating from CAS and other SGB tribunals as discussed in the last section. This is law which is part of the legal framework of all member states, either directly via regulations or via suitably drafted domestic acts following a directive or by operation of the jurisprudence of the European Court of Justice<sup>256</sup>. This law is applicable to all in any given member state and there is no way for an individual citizen to opt out of it. The ‘specificity’ of sport, emanating from Article 165 TFEU and the 2007 White Paper on Sport is reinforced in judgments such as *Lehtonen*<sup>257</sup> and *Bosman*<sup>258</sup>. Certain areas of sporting regulation, those purely to do with sporting rules, are taken out of the realm of EU law and only those which have a commercial aspect are subject to ECJ jurisdiction. The case of *Deliège*<sup>259</sup> provides further assistance as to which rules have both a sporting and commercial aspect as they may be hybrid in

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<sup>254</sup> See for instance, ‘Cabinet splits result in bad start to Brexit negotiations’, (*Daily Telegraph Online* 7 August 2017), available at: <http://www.telegraph.co.uk/news/2017/08/06/cabinet-splits-result-bad-start-brexit-negotiations/> (accessed on 05/09/17) and Lizzy Buchan, ‘Theresa May to make mystery 'important intervention' that could delay Brexit talks, European Parliament negotiator reveals’, London: *Independent Online*, 5 September 2017, available at: <http://www.independent.co.uk/news/uk/politics/brexit-talks-delay-theresa-may-eu-european-parliament-important-intervention-guy-verhofstadt-a7929526.html> (accessed on 05/09/17).

<sup>255</sup> Art. 165 Treaty on the Functioning of the European Union (TFEU).

<sup>256</sup> Karen Davies, *Understanding European Law*, 5<sup>th</sup> Edn. (Oxford: Routledge 2013) 53-62

<sup>257</sup> Case C-176/96 Jyri Lehtonen and Castors Canada Dry Namm-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB).

<sup>258</sup> Case C-415/93 Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman (1995).

<sup>259</sup> Christelle Deliège V Ligue Francophone de Judo et Disciplines ASBL (Joined cases C-51/96 and C-191/97).

this respect. In that case, the claimant believed that the rules pertaining to selection for international competition by her Belgian-based ISF had frustrated her career. This was because limits were placed on the numbers put forward for international competitions from each national federation. Most importantly, the court found that rules of this nature to be economic in part, and therefore potentially subject to EU law. There is a wealth of academic work on the existence of EU sports law. For example, for Parrish, ‘...the relationship between sport and the EU has a relevance beyond the narrow confines of regulating economic activity within the Single Market. The EU has social and cultural aspirations and sport has been identified by the EU institutions as one of the tools through which these goals can be achieved’<sup>260</sup>. Weatherill considers that ‘...in mapping the future co-existence between [EU] law and sport, the vital feature of *Bosman*...is that the court admitted that...sport in general, possesses unusual characteristics that distinguishes it from “normal” commercial sectors’<sup>261</sup>. He further argues that this means the challenge for SGBs and IFs for the future is to devise sporting rules that do not fall foul of EU law; that is to say, rules that are more difficult to construe as being at all economic in nature. In an era of ever increasing commercialisation of sport, that is likely to prove difficult. In *Deliège*, the court held that although the selection rules were part of the organisation of the sport, the likelihood of interest in international competitions by paying spectators and broadcasters wanting exclusive rights gave those rules an economic aspect. This was highly unlikely to have been the intention of, or even foreseen by, the rule draftspersons. If, however, lawyers need to take EU sports law into account when constructing regulation, this is strong evidence that it is a real concept with practical implications. Taking the above in its entirety, there must therefore be a convincing argument that an EU law based on *lex sportiva* does exist and that, on Abbott and Snidall’s continuum, it must be considered ‘hard law’.

Accepting that there is a European sports law, it is still difficult to assess the importance of this *lex sportiva* to the UK post 2019 *in the context of this thesis*. It must also be borne in mind that the debate in this chapter is for the purpose of assessing the overall landscape of *lex sportiva* to a

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<sup>260</sup> Richard Parrish, ‘The Birth of European Union Sports Law’, (2003) *The Entertainment and Sports Law Journal*, 2(2), 2, 22.

<sup>261</sup> Steven Weatherill, ‘“Fair Play Please!” Recent Developments in the application of EC Law to Sport,’ (2003) *Common Market Law Review*, 40, 53-54.



specific end. The aim is for that to be a basis from which the particular problems in consistency within global equine sports law can be analysed. These contradictions are considerable as shall be discussed, but the existence of a body of an EU *lex sportiva* provides only limited relief. Unless the accused party is a citizen of the EU or European Economic Area (EEA), or the relevant venue is within this jurisdiction, the ECJ would not provide an appeal process. Nor could it, by its jurisprudence, be able to harmonise some of the conflicting wording and decisions arising from the various unconnected SGB disciplinary procedures explained later. As an example, further on in this chapter, the lack of reciprocity and conflicts in processes between the BHA and the Royal West India Turf Club (RWITC) will be analysed. It is difficult to see how that could be resolved by reference to ECJ decisions if there is a so-called ‘hard Brexit’. As another example, the FEI is based in Switzerland which has a number of bi-lateral agreements with the EU<sup>262</sup> and currently the BHA is an institution in one of the member states. Consequently, if a case revolved around the differing standards of proof between those SGBs and a ‘prohibited association’ allegation (see later), ECJ jurisprudence might well be relevant. That said, this would only be the case if the ‘specificity’ of sport applied and this would happen if the dispute were about rules with an economic aspect. If, for example an argument was constructed such that the ‘prohibited association’ was in effect a restraint of trade, EU law would apply as there is no ‘specificity’ in this instance. Given the limitations on the applicability of an EU *lex sportiva* presented by equine sports which operate globally, it is difficult to take this discussion much further. Add to that the lack of clarity about the applicability of that *lex sportiva* to a UK based SGB or IF after March 2019. Put another way, it is difficult to see how the existence of an EU *lex sportiva* affects in large measure the theme developing in this thesis. This is the lack of consistency between the regulations of even the major equine SGBs and IFs with a UK focus but in a worldwide context.

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<sup>262</sup> See generally, *Switzerland and the European Union*, published by the Schweizerische Eidgenossenschaft (Swiss Federal Department of Foreign Affairs (FDFA) available at: [https://www.eda.admin.ch/dam/eda/en/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU\\_en.pdf](https://www.eda.admin.ch/dam/eda/en/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_en.pdf), (accessed on 19/09/17).

### 5.2.2 Concluding the ‘soft vs hard’ debate

There is no intent here to dismiss the importance of EU sports law up to the present day and until 2019. However, because of space and the as yet unascertainable implications of ‘Brexit’ it is necessary to move on now to conclude this debate. In the UK, the state has largely steadfastly refused to have a hand in the operation of sports governance, although at time of writing the possibility of legislation to reform the English FA is being discussed<sup>263</sup>. Several judicial decisions establish that SGBs are not public bodies for the purposes of Judicial Review or under the Human Rights Act 1998 although a certain amount of supervisory jurisdiction over SGBs has been accepted by the courts<sup>264</sup>. There is however almost no current statute law devoted to sports governance or discipline. This largely non-interventionist approach to sports governance (when compared to a number of jurisdictions<sup>265</sup>) does not prevent the decisions of SGB tribunals and CAS on disciplinary matters from having binding force as they are underpinned by the law of contract and that of arbitration or subject ultimately to the courts general supervisory function. Implementing Abbott and Snidall’s continuum between soft and hard law that *lex sportiva* as defined in this research is hard law. This is whether the law is domestic, supra-national, or created by the interaction between equine sports arbitration proceedings and the national courts as there is sufficient precision and binding force for *lex sportiva*, where it exists at all, to be hard law.

This research is committed to studying the relationship of the sports participant or other stakeholder and SGB under a *radical humanist* paradigm. As such, the ‘application of (equine) sporting rules’ interpretation of the term *lex sportiva* in horse sport is still a subjective concept notwithstanding its hard law categorisation. The ‘cognitive wedge’<sup>266</sup>, the effects of which a *radical humanist* analysis seeks to mitigate, exists between the citizen and their true consciousness as a result of the ideological superstructure with which they relate. This is the state for Gramsci, but by analogy, in this research, it is the SGB. Put another way, the ‘wedge’ also exists between the athlete or other stakeholder and their true consciousness as a result of the SGB

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<sup>263</sup> Coway (n 74).

<sup>264</sup> Bradley v Jockey Club [2004] EWHC Civ 2164 (QB)

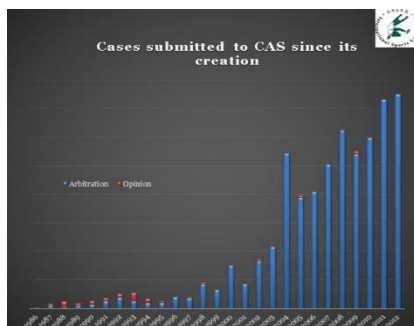
<sup>265</sup> James (n 235) 7.

<sup>266</sup> Burrell and Morgan (n 49) 55-56.

as an ideological superstructure. For Marx, the aim is to persuade of the need for a new *weltanschauungen* as a subjective view. This research aims to make a persuasive argument for the need of a similar new ‘world outlook’ for sports participants and other people subject to sports disciplinary codes. Part of that approach is to lobby for a new understanding of *lex sportiva* in the context of equine sports.

The contested and uncertain nature of the term *lex sportiva* in a general sporting context, as discussed above, is generally an important academic debate. As shall be proven going forward, in the *specific context* of equine sports, it is even harder to justify discussion of a coherent equine sport *lex sportiva*. This problem has real and practical consequences. The foregoing discussion does not mean in any way that the study of the interaction between domestic law and sport is not a distinct and worthwhile discipline, far from it. As sport grows in commercial importance, the need for further research and for specialist lawyers in this sector will grow exponentially. To re-iterate for clarity though, the term *lex sportiva* is used henceforth in this research as referring to the decisions of CAS on equestrian sports and those of disciplinary boards in non-code compliant equine sports, such as the BHA in UK horse racing. For the avoidance of doubt, the existence of a coherent EU law based on *lex sportiva* is acknowledged, albeit under the caveat that it has limited applicability to the following arguments. Given that the case of equine sports produces such unique challenges in this regard, it may well be essential going forward to found a new sub-genre of *equinae lex sportiva* – ‘equine sports law’.

### 5.2.3 The coherence of *equinae lex sportiva* jurisprudence



**Figure 5 - The relative increase in cases submitted to CAS**

The previous sections shed light on the contested nature of the term *lex sportiva* before establishing the parameters of the phrase for this research. These limits are that it is only useful *in the context of equine sports* to use the term in reference to the emanations of CAS and non-code compliant disciplinary proceedings, the pre-eminent one being the BHA appeal system. This section seeks to prove whether or not the *prima facie* lack of coherence discussed up to this point is real or

apparent.

As a first point, any suggestion that the *lex sportiva* debate is purely an academic one is refuted. Davis posits that the ‘sport and the law’ versus sports law debate is not just an academic one<sup>267</sup>. However, Gardiner notes that Lewis and Taylor prefer not to address the distinction between sports law and ‘sport and the law’, as it is an issue of ‘academic rather than practical interest’<sup>268</sup>. This latter view is not supportable when applied to equine sports and the *interface problem* discussed in more detail shortly, which makes clear how difficult it is to prove the existence of a coherent body of jurisprudence on horses in sport. The existence of such a body of case law is crucial to establishing that *lex sportiva* is a meaningful concept at all in horse sport. It is further postulated that if it is not meaningful, this highlights a major challenge for the governance of these sports because *lacunae* will continue to emerge as the following sections will examine.

#### **5.2.4 The Court of Arbitration for Sport**

CAS is the arbitral body to which all FEI governed sports participants submit. This is a unique institution, as it has the distinction of being the only international tribunal dedicated entirely to the resolution of sports disputes by arbitration<sup>269</sup>. CAS was the brainchild of International Olympic Committee president Juan Antonio Samaranch<sup>270</sup>. A working party chaired by International Court of Justice judge HE Keba Mbaye<sup>271</sup> brought the idea to a reality<sup>272</sup>. CAS began modestly hearing cases ad hoc from ISFs based in Switzerland, but in 1991 published a model arbitration clause which, by 2011, was a requirement in the rule books of Olympic sports mandated by Olympic Charter<sup>273</sup>. These developments caused a ‘steady stream of disciplinary (in particular doping) cases to start to flow into CAS’<sup>274</sup>(see *Fig. 5*).

In *Gundel v FEI*<sup>275</sup> before the Swiss Federal Tribunal, it was held *obiter* that the links between the IOC and CAS might render it ineligible to be considered an impartial arbitral body under Swiss law if the IOC was a party to any proceedings. Consequently, during 1994 CAS was

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<sup>267</sup> Davis (n 234) 31-32.

<sup>268</sup> Lewis and Taylor (n 12).

<sup>269</sup> *Ibid.*, 1036.

<sup>270</sup> Born 17<sup>th</sup> July 1920, died 21<sup>st</sup> April 2010, Seventh President of IOC between 1980 and 2001.

<sup>271</sup> Born 6<sup>th</sup> April 1924, died 12<sup>th</sup> January 2007, member of the IOC 1973 to 2002.

<sup>272</sup> Lewis and Taylor (n 12) 1036.

<sup>273</sup> Olympic Charter (2011), Rule 61.

<sup>274</sup> Lewis and Taylor (n 12) 1037.

<sup>275</sup> 15<sup>th</sup> March 1993 reported in CAS Digest I, p566.

reshaped to loosen its ties with the IOC and supervision and funding passed to the newly-created International Council of Arbitration for Sport (ICAS). In *Gundel v FEI*, the SFT confirmed that CAS is a properly constituted impartial arbitral body in Swiss law. Between 250 and 350 cases are now filed with CAS annually<sup>276</sup>. Appeal on procedural grounds lies to the Swiss Federal Tribunal the grounds of which are found in s.190(2)(a-d) *Swiss Private International Law Act*, for example that the arbitral panel was incorrectly appointed, or that it incorrectly declined jurisdiction in a case<sup>277</sup>. However, in *Matuzalém v FIFA* Decision 4A.558/2011<sup>278</sup> a decision of CAS was annulled on substantive law grounds for the first time. FIFA had previously sought an award from CAS that unless damages were paid to FC Shaktar Donetsk by footballer Matuzalém and Real Zaragoza Football Club amounting to €11.9m for a breach of contract, Matuzalém would be banned from playing football professionally worldwide. The SFT ruled that this breached fundamental legal principles and generally recognised values by preventing the player from earning a living from his profession<sup>279</sup>. It should be noted that while this does appear to broaden the scope of appeals to the SFT, it may be that this approach will be limited to cases such as this which was on the enforcement of an arbitral award, essentially a private law dispute. Cases with a public policy element, such as those concerning doping, may continue to only be reviewable on procedural grounds, but this is far from certain.

To summarise, CAS is an independent arbitral body with full status as such in Swiss law. CAS awards are enforceable in domestic courts by the *New York Convention on the Recognition and Enforcement of Arbitral Awards 1958*. Appeals on procedural matters, and perhaps under an emerging substantive law head, lie with the SFT. Most importantly however, CAS can hear appeals from all sports that accept its jurisdiction; the Olympic sports of show jumping, eventing, dressage and para-dressage have recourse to CAS because they are governed by the FEI. Some of the multitude of global horse sports which are not Olympic sports, such as endurance, do submit to CAS jurisdiction through submission to the WADA Code, whereas some, such as horse racing, do not. That being said, disputants can agree to submit to CAS in writing on a ‘one

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<sup>276</sup> Lewis and Taylor (n 12) 1037-1039.

<sup>277</sup> James (n 235) 63.

<sup>278</sup> 27<sup>th</sup> March 2012, SFT.

<sup>279</sup> James (n 235) 64-65.

off’ basis. It is therefore necessary to examine this patchy relationship between equine-based sport and CAS to establish whether it is possible to say that there is a coherent body of case law relating to horses and sport. The parameters of *equine lex sportiva* for this research are the emanations of CAS and equivalent arbitral awards from, in the main, the BHA process. The question is whether even that conception of *lex sportiva* means a coherent and meaningful body of law.

### 5.2.5 CAS ‘jurisprudence’ on equine sport

Jurisprudence is ‘...the theoretical or philosophical study of law... [for example,] [w]hat are the defining or essential features of law and legal systems? Is there a moral obligation to obey the law? How do legal rules work? What are the connections between law and justice?’<sup>280</sup> Inevitably this requires a coherent body of law to study, but this appears unlikely with horse sport because these diverse sports have evolved in such a fragmented way.

The involvement of equestrianism in the development of CAS is not in dispute. The *Gundel*<sup>281</sup> case was pivotal in bringing about change. That case would, in turn, not have been brought had the FEI not have been the first SGB to adopt the following clause:

‘Any dispute arising from the present Statutes and Regulations of the ... Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts. The parties undertake to comply with the said Statute and Regulations, and to accept in good faith the award rendered and in no way, hinder its execution.’<sup>282</sup>

The latest development in relation to clauses like these is, at the time of writing, in its latter if not final stages. A skater, Claudia Pechstein, has challenged a doping ban imposed by the

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<sup>280</sup> James Penner and Emmanuelle Melissaris, *McCoubrey & White’s Textbook on Jurisprudence*, 5<sup>th</sup> Edn, (Oxford: OUP 2012) 1.

<sup>281</sup> CAS 92/63 G. v/ FEI available at <http://jurisprudence.tas-cas.org/> (accessed on 11<sup>th</sup> May 2015)

<sup>282</sup> CAS Guide to Arbitration 1991, reproduced at <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed on 11<sup>th</sup> May 2015).

International Skating Union (ISU) and upheld by CAS<sup>283</sup> in the domestic courts of her native Germany. At first instance, in December 2012, Ms Pechstein made a claim of €4.4m because she alleged the two-year doping ban handed her by the ISU was invalid, based in turn on the ‘forced’ nature of the arbitration clause. Ms Pechstein claimed she had no choice in agreeing to it as a condition of competing at the appropriate level in her sport. This is an argument which could be raised by any sportsperson hoping to compete at the elite level in any sport which is why the potential effect of this case is so far reaching. Ms Pechstein lost the case but on appeal on 15<sup>th</sup> January 2014 the Higher Regional Court ruled in her favour<sup>284</sup> agreeing *inter alia* that the CAS tribunal was not independent enough to satisfy the requirements of Article 6 ECHR in respect of a Right to a Fair Trial. It followed then that the German Courts were not bound to enforce the CAS award under the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. This is because of Article V para. 2 (b), whereby enforcement of a foreign arbitrary award may be refused if ‘the recognition or enforcement of the award would be contrary to the public policy of that country’. The ISU, however, lodged a successful appeal with the German Federal Court of Justice. There remains the possibility of an appeal to the German Constitutional Court, but at the moment the matter appears settled. Had the case ultimately gone the other way, the ramifications would have been enormous for CAS<sup>285</sup> who would have no longer been able to rely on the arbitrations clauses in athletes’ contracts, at least within the EU, as Germany is a member. This underlines the potential vulnerability of the ‘Supreme’ Court of world sport, and thus the precarious nature of its body of jurisprudence.

However, in terms of actions other than that by *Gundel*, there are twenty cases involving horses or horse riders in the TAS/CAS archive, from 1991 onwards. These concern show jumping, endurance, and dressage, or are on matters which could be considered relevant to all of those disciplines. These decisions, however, have no direct applicability in the disciplinary proceedings of the remainder of worldwide horse sport unless they recognise the jurisdiction of

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<sup>283</sup> CAS 2009/A/1912

<sup>284</sup> Landgericht München, judgment dated February 26, 2014, file no. 37 O 28331/12

<sup>285</sup> Antoine Duval and Ben Van Rompuy, ‘The Compatibility of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded’ (2015) available at: <https://ssrn.com/abstract=2621983> (accessed on 21/04/17).

CAS. This group of outsiders includes horse racing, which is the giant of equine sport, at least in terms of economic turnover, and sheer numbers of participants and spectators.

It is asserted that CAS has been developing a coherent, completely new, branch of law. This argument has not hitherto been discussed taking into account equine sports. There is a corpus of rules, regulations, and case decisions put together by ISFs from the FEI to the FIP and others that could be studied. In addition, there is domestic case law related to those decisions which would pertain to sports persons competing with horses. Further, in the case of the UK there are disciplinary proceedings unconnected with those the FEI bring<sup>286</sup> to domestic case law which brings SGBs rules before the court for adjudication<sup>287</sup>. There is also legislation which criminalises sporting foul play in some circumstances<sup>288</sup>. For Foschi, writing about sports generally, there is a problem created by ‘...inconsistency – between sports, between the IOC and IFs, and IFs and [S]GBs...[w]hile the CAS was helpful to some degree because of its independence, it could not make up for the confusion resulting from...’<sup>289</sup> these inconsistencies. In particular, in terms of horse-based sport, there is no consistent body of jurisprudence because CAS cases involving horses relate to far too limited a range of equine sports. It is possible though that there may be influence from CAS decisions on non-FEI affiliated SGBs, something which might be termed a ‘horizontal’ effect.

### **5.2.6 The influence of CAS on ‘unaffiliated’ SGBs**

It is beyond the scope of a work this size to consider the global and domestic sports law that is of direct relevance to all, or even a considerable number, of the enormous number of horse sports worldwide. It may well be that disciplinary panels within say, the FIP<sup>290</sup> or British Horseball Association or *France Galop*<sup>291</sup>, are alive to the deliberations and outcomes that make up CAS

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<sup>286</sup> Appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold, & Kirsty Milczarek (10/04/12) available at <http://www.britishhorseracing.com/resources/about/whatwedo/disciplinary/disciplinaryDetail.asp?item=096634> (accessed on 06/11/12)

<sup>287</sup> *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB)

<sup>288</sup> Bribery Act 2010.

<sup>289</sup> Jessica Foschi, ‘A constant battle: The evolving challenges in the international fight against doping in sport.’ (2006) *Duke Journal of Comparative International Law* 16(2), 457-486, pp460-461.

<sup>290</sup> Federation of International Polo has signed a Memorandum of Understanding with the FEI and thus may be considered along with fully Code/CAS compliant sports: [www.fippolo.com/](http://www.fippolo.com/) (accessed on 04/06/15).

<sup>291</sup> The governing body of flat and steeplechase racing in France, formed in 1995.



awards. For the purposes of this thesis though, taking as it does a UK perspective, the most useful analysis would be regarding the disciplinary procedures of the most well-established and best known SGB in relation to horses, the BHA, the successor to the Jockey Club and British Horse Racing Board (BHB). It is also the case that horse racing has the longest history of doping control, longer than any human only sport, dating back to the beginning of the 20<sup>th</sup> century<sup>292</sup>.

It is worth considering why the governance of equine sports is so fragmented. There has been no serious effort to bring together the governance regimes of even the two major players, horse racing and the Olympic equestrian disciplines. These regimes are monopolies with a dominant market position as has been stated in case law and in commentary<sup>293</sup>. They are also miniature societies, operating on the face of it under democratic principles. From a Gramscian perspective, it is unsurprising that the ‘ruling class’ in these societies is unwilling to share power through amalgamation. This is especially because some individuals will lose power altogether, through removal of duplication of role; there would be no need for two CEOs for example. For Gramsci, the rulers always act like this, they may make some changes, or appear to change, but ultimately the power structures remain fundamentally unaltered:

‘The traditional ruling class, which has numerous trained cadres, changes men and programmes and, with greater speed than is achieved by the subordinate classes, reabsorbs the control that was slipping from its grasp. Perhaps it may make sacrifices, and expose itself to an uncertain future by demagogic promises; but it retains power, reinforces it for the time being, and uses it to crush its adversary and disperse his leading cadres.’<sup>294</sup>

This is as true of resistance to change within the organisation as it is to change that would come from merger, or at state level, internationally-imposed regime change. The Quinlan Review of 2016 brought about in large part by the *Jim Best* case illustrates Gramsci’s point in a sporting context. Jim Best is a racehorse trainer of some renown. It was alleged that he instructed jockeys

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<sup>292</sup> Neil Carter, ‘Testing Times’ in: Neil Carter, *Medicine Sport and the Body: A Historical Perspective*, (London: Bloomsbury Academic 2012) 105.

<sup>293</sup> Duval and Rompuy (n 285) .

<sup>294</sup> Antonio Gramsci and David Forgacs, *The Gramsci Reader: Selected Writings, 1916-1935*, (New York: Schocken Books 1988) 218.

on more than one occasion to ‘stop’ horses in breach of Rule (D) 45 (see below). The appeal board agreed that there was at least the potential for bias on the original panel because one member also acted as a consultant for the BHA<sup>295</sup>. As a direct result of the allegations of bias, and the potential for other cases to be re-opened that had been heard by this panel member, Christopher Quinlan QC conducted a review for the BHA. The scope included ensuring ‘that the disciplinary, licensing, and appeal functions remained legally robust and would withstand legal challenge’, ensuring ‘that proceedings before such bodies comply with the highest standards of procedural fairness...’<sup>296</sup> The result was that the BHA set up an arm’s length disciplinary hierarchy and process with some haste<sup>297</sup> but still under the Orders and Rules of Racing and not utilising CAS or a national level arbitration service such as Sports Resolutions (UK)<sup>298</sup> nor any move towards utilisation of the WADA Code. If the problem found was a disciplinary regime that was seen to be insufficiently independent, it seems odd that the expedient of utilising national arbitration centres, CAS, and the WADA Code was not used. CAS is, after all, already set up to hear equine sports cases and integrity disputes not limited to doping. There was a nod in this direction in so far as Sports Resolutions UK was to be asked to assist with training and support for jockeys and trainers facing a hearing.<sup>299</sup> An opportunity was missed here, but such a move would have meant a sharing and/or dissolution of power, something the ‘rulers’ are averse to. Gramsci would acknowledge there has been some shape-shifting, but ultimately power did not slip from the BHA’s grasp.

This research has established that the BHA is not an equivalent of the FEI, and horse racing has no global governing body as such. In 2013 the FEI and IFHRA co-operated in forming the International Horse Sport Confederation (IHSC) however. This was for the ‘...exchange of

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<sup>295</sup> ‘Jim Best may seek High Court ruling over rehearing dispute with BHA’, (London: Guardian Online 28 August 2016) available at: <https://www.theguardian.com/sport/2016/aug/28/jim-best-high-court-ruling-rehearing-bha> (accessed on 20/10/16).

<sup>296</sup> Quinlan Review, Terms of Reference 2016 available at: <http://www.britishhorseracing.com/wp-content/uploads/2016/06/TERMS-OF-REFERENCE-Review-of-DP-AB-and-LC-01-06-16.pdf> (accessed on 20/10/16)

<sup>297</sup> BHA Press Release – available at: [http://www.britishhorseracing.com/press\\_releases/bha-changes-to-disciplinary-panels-and-regulatory-functions/](http://www.britishhorseracing.com/press_releases/bha-changes-to-disciplinary-panels-and-regulatory-functions/) (accessed on 21/04/17).

<sup>298</sup> Sports Resolutions UK: <https://www.sportresolutions.co.uk/> (accessed on 21/04/17).

<sup>299</sup> ‘Quinlan Report’ September 2016 – *Review of the Disciplinary Panel, Licensing Committee and Appeal Board of the British Horseracing Authority*, Recommendation 16, available at: <http://www.britishhorseracing.com/wp-content/uploads/2016/09/Christopher-Quinlan-QC-Report-29-09-16.pdf> (accessed on 21/04/17).

information and technical knowledge, and collaboration on issues that represent the collective interests’ of the FEI and the IFHRA...’ to include horse welfare and anti-doping. There was an acknowledgement of the mutual benefits from linking ... ‘the wealth of our expertise in the racing world and within the equestrian sports governed by the FEI’<sup>300</sup>. As the IFHRA is only a loose federation in its own right, the limited aims of the IHSC are understandable. At the inaugural meeting in 2014 there was a meeting of minds but little more. There was certainly no effort to address the possibility of concrete action to bridge the somewhat illogical distinctions between the sports. It was agreed that ‘...there are many commonalities and opportunities for further cooperation. Although there are operational differences due to regulatory requirements of our sports, both organisations are united by the horse and a shared philosophy built on our common values’<sup>301</sup>. This may however be a foundation upon which much more can be built, appoint to which this thesis will return.

Returning to the IFHRA itself, there is the *International Agreement on Breeding, Racing and Wagering*, administered by the IFHRA which ‘brings together a series of articles, appendices and guidelines setting out recommended best practice in significant areas of racing, stud book administration and wagering common to all jurisdictions’<sup>302</sup>. This has a number of key objectives, for instance ‘to enhance public confidence in the integrity of the sport of racing and of its breeding industry’ and to ‘protect the safety and welfare of horses and riders’<sup>303</sup>. This document hardly does more than attempt to share best practice however as:

‘[a]ll members of the Federation commit themselves to furthering those objectives and undertake to use their best endeavours wherever this is reasonably possible. Under each Article is a list of those countries which have adopted the Article, indicating in some cases those parts which they have excluded. Members who have adopted an Article in

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<sup>300</sup> FEI Press Release dated 7<sup>th</sup> November 2013 available at <https://inside.fei.org/news/international-horse-sports-confederation-unites-equestrian-sport> (accessed on 04/10/17).

<sup>301</sup> BEF Statement dated 1<sup>st</sup> April 2014 available at: <http://www.bef.co.uk/News-Detail.aspx?news=IHSC-FEI> (accessed on 04/10/17).

<sup>302</sup> IFHRA website: available at <http://www.horseracingintfed.com/default.asp?section=IABRW&area=2> (accessed on 14/05/15)

<sup>303</sup> *Ibid.*

full or in part shall make provision within their domestic rules implementing its intentions<sup>304</sup>.

In practice, whether there is true international agreement on any issue is dependent on exactly which countries have signed up to a given article, in its entirety. It is open to any racing authority to agree to part of an article, but not all of it. Article 10 is a useful example, when a rider, owner, or trainer is sanctioned under one jurisdiction, signatories to this article can ask the racing authority for another jurisdiction to apply the same sanction should the transgressor arrive there to participate in professional racing. An illustration of the limitations of this article, which in turn highlights the limitations of this agreement, will however become apparent as BHA Appeal Board hearings are considered in the forthcoming discussion.

Jockeys, owners, and trainers, and in some cases other persons, are subject to the 'Rules of Racing'. Any breach would initially be dealt with by the stewards at race meetings, but a case can be taken to the BHA Disciplinary Panel and ultimately the appeal board. It was considered particularly useful to perform an analysis of the findings of the appeal board here because it has among its members Lords Justices of Appeal and uses a clear system of precedent, referring to both its own former decisions and those of domestic courts in an application of a version of *stare decisis*. In Mullins (20/08/04), 'It's a Man's World'<sup>305</sup> (16/12/11), Dwyer (09/10/13) and Knott and Callow (20/10/14) there are references either to domestic case law, CAS cases, or previous appeal board decisions. This tribunal is therefore the most likely to produce detailed legal reasoning in its awards from which the extent of the influence of CAS can be discerned. Since July of 2002 there have been forty-six<sup>306</sup> appeals heard by the board and consideration of their importance to the arguments in this thesis follows.

Only three of the forty-six cases involve allegations of doping, only one of which makes any reference to CAS precedents, the remainder are for a variety of breaches of the rules<sup>307</sup> which are

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<sup>304</sup> *Ibid.*

<sup>305</sup> Also referred to in this thesis as the Appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold and Kirsty Milczarek (See Appendix 2).

<sup>306</sup> BHA Disciplinary Appeal Hearings: available at <http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/> (accessed on 16/05/15).

<sup>307</sup> BHA Orders and Rules of Racing: available at <http://rules.britishhorseracing.com/Home> (accessed on 16/05/15)

to do with integrity, but not in relation to PEDs. Examples of these include ‘stopping’ a breach of what is now Rule (D) 45:

‘45.1 A Rider must

45.1.1 ride his horse throughout the race in such a way that he can be seen to have made a genuine attempt to obtain from his horse timely, real, and substantial efforts to achieve the best possible placing, and

45.1.2 take and be seen to take all other reasonable and permissible measures throughout the race, however it develops, to ensure the horse is given a full opportunity to achieve the best possible placing.’

Other examples included charges that can arise from alleged fraud concerning betting and inside information, sometimes in conjunction with ‘stopping’ now that it is possible to bet on a horse to lose:

Rule (A) 41:

‘A Person who

41.1 is guilty of the commission of any corrupt or fraudulent practice in relation to racing in this or any other country,

41.2 conspires with any other Person for the commission of such a practice, or

41.3 connives at any other Person being guilty of such a practice,

shall be taken to have contravened a requirement imposed on him by these Rules.’

There are however arguments raised in some of these cases which at least have some common ground with those that could come before CAS or a domestic UK court dealing with an FEI rule breach appeal. For instance, in Easterby (04/07/02) and Keightley (24/04/06) there are references to arguments that the stewards at the racecourse, and/or the disciplinary panel made decisions which were in effect something akin to being ‘Wednesbury Unreasonable’ with echoes of

judicial review rationale. In *Bradley* (02/04/05), which ultimately became *Bradley v Jockey Club*<sup>308</sup> and *Mullins* (20/08/04), which in due course became *Mullins v MacFarlane*<sup>309</sup> there are overt references to proportionality and Article 6 ECHR, the Right to a Fair Trial. Further, issues of proportionality of punishment are raised in *Tyrell* (01/02/11) and *Thompson* (25/11/11) although neither the Human Rights Act nor the ECHR are mentioned directly in the case reports. For Gardiner, considering *Bradley v Jockey Club*, *Fallon v HRA*<sup>310</sup> and an athletics case, *Chambers v BOA*<sup>311</sup>, proportionality has emerged as a core principle in respect of the conduct of SGBs, but the courts will only intervene where a decision maker has taken a decision that ‘falls outwith the range of reasonable responses open to them, maintaining a margin of appreciation for SGBs’<sup>312</sup>.

There are also cases on the international reciprocity provisions of the *International Agreement on Breeding, Racing and Wagering* mentioned above, *Hughes* (28/03/12 and 20/04/12) and *Dwyer* (09/10/03) concern applications by the Royal West India Turf Club (RWITC) to have its sanctions on UK riders replicated by the BHA when they returned to race in the UK. These applications failed because of concerns about the way the RWITC handled the cases, and in the case of *Hughes* at least, because in 2007 the RWITC ceased to be a signatory to Article 10 of that agreement. It is unclear whether the appeal board was going as far as to say that the procedures would not have met Article 6 ECHR requirements for a fair trial, but the fact the RWITC specifically prohibited qualified legal representation was singled out for comment. In any event, the failure of the RWITC cases brought under Article 10 of the agreement rather underlines the patchy and unsatisfactory nature of the international regulation of horseracing.

There are further cases which are particularly interesting because they pertain to a provision, the equivalent of which has only recently entered the WADA Code, and therefore also the FEI EADCMRs, that is, controls on association with disciplined persons. The likely problems with the WADA/FEI provisions are central to the points here about the consequences of a lack of a

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<sup>308</sup> [2004] EWHC Civ 2164 (QB).

<sup>309</sup> [2006] EWHC 986 (QB).

<sup>310</sup> [2006] EWHC 2030 (QB)

<sup>311</sup> [2008] All ER (D) 255 (Jul)

<sup>312</sup> Gardiner (n 80) 119-120.

true *lex sportiva* where horses are concerned, largely because of the piecemeal governance arrangements.

The EADCMRs applicable to FEI disciplines effective from 1<sup>st</sup> January 2015 contain a new set of provisions which reflect similar additions to the WADA Code. Article 2.9 ‘Prohibited Association’ makes it a disciplinary offence to associate with someone who is either serving a period of ineligibility for a doping offence under an FEI regulatory regime or:

‘where Ineligibility has not been addressed in a results management process pursuant to the Code, has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person’<sup>313</sup>.

This appears to cover disciplinary proceedings by other Code-compliant SGB or ISF disciplinary processes that are not under the auspices of the FEI. An example might be that an Olympic gymnast banned for a doping violation in their own sport would not now be able to have any association, much less coach, a vaulting<sup>314</sup> team. There are provisos that the FEI must warn the person about their association being in potential breach of this provision and the accused must reasonably be able to avoid the association. For example, there are in show jumping and eventing a number of married and co-habiting couples who participate in these sports, and a doping offence committed by one would not, on a bare reading of this provision, mean a breach of Article 2.9 is inevitable for obvious reasons. There is also a reverse burden such that the accused may ‘establish that any association with the support person described in Article 2.9.1 and 2.9.2 is not in a professional or sport-related capacity’<sup>315</sup>. The article is retrospective in application however in that it specifically ignores EADCMR Article 16 on retroactivity. In other words, it applies to someone whose ban began before 1<sup>st</sup> January 2015 as long as it has not expired.

What is particularly noteworthy for the arguments in this chapter is that ‘found in a...disciplinary or professional proceedings to have engaged in conduct which would have constituted a violation

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<sup>313</sup> FEI EADCMRs, Effective 1<sup>st</sup> January 2015, Art. 2.9.2.

<sup>314</sup> This is an FEI sport and essentially involves individual or multiple participants performing gymnastic routines on the back of a horse cantering in a circle.

<sup>315</sup> EADCMRs, Effective 1<sup>st</sup> January 2015, Art. 2.9.

of anti-doping rules if Code-compliant rules had been applicable to such Person' could well involve persons found liable in BHA proceedings. This research considers the likelihood of such a case succeeding in 5.3.3 later. The equestrian press has been quick to point out the lack of awareness of this provision, despite its potentially career limiting effects:

'A new FEI rule could prevent riders suspended for doping offences from continuing to make a living in the sports horse industry. But very few riders are aware of it, according to research....'<sup>316</sup>

An important point to note is that there are already cases under the BHA version of this restriction which is much longer established, but more limited in scope. What is now Rule (A) 30 prohibits certain types of associations:

'30.3 A Person must not in connection with horseracing in Great Britain associate with

30.3.1 a Disqualified Person; or

30.3.2 a Person who is excluded under Rule 64 from any premises licensed by the Authority

unless he obtains the prior permission of the Authority'<sup>317</sup>.

Rule (A) 68.1 makes it clear a 'disqualified person' means someone disqualified by a 'Recognised Racing Authority' and so this would not automatically apply to someone disqualified by the FEI or another equine sport SGB. It should be noted though that the restriction is quite broad in another respect, the BHA's jurisdiction applies beyond those subject directly to its rules<sup>318</sup> by virtue of being an owner, trainer, or jockey. A person excluded under Rule 64 can be almost anyone:

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<sup>316</sup> Pippa Cuckson, 'Riders Unaware of FEI Rule that Could Destroy Their Careers' (Horse and Hound 27 April 2015) available at <http://www.horseandhound.co.uk/news/fei-professional-association-rule-483551> (accessed on 19/05/15).

<sup>317</sup> BHA Orders and Rules of racing, Available at <http://rules.britishhorseracing.com/Orders-and-rules&staticID=126195&depth=3> (accessed on 19/05/15).

<sup>318</sup> See also *Davis v Carew-Pole* [1956] 1 WLR 833 where the 'contractual nexus' can bring a person under the auspices of an SGB just by attending a hearing.



‘64.1 The Authority may exclude a Person from any premises licensed by them, or cause or order him to be excluded from such premises where the Authority considers the presence of the Person on such premises is undesirable in the interest of racing.

...

64.3 A Person may be excluded under this Rule whether or not he is otherwise subject to these Rules and even though he is not, and has not been declared, a Disqualified Person<sup>319</sup>.

This does appear to mean that BHA discretion under these provisions is much wider than that the FEI give themselves in the EADCMRs. In any event, the very similar forerunners of these rules were considered in the appeal board hearings of Keightly (24/04/06), Burke, and Rogers (20/07/09) and Heffernan and others (25/01/03). In the latter appeal, the board specifically sought to reinforce the point that Rule A(64) can be used to exclude persons not subject to the Rules of Racing and to bring others, in this case persons whose main occupation was in connection with professional football, under the remit of the rules generally.

To reiterate, the full importance of this appeal board case law will be discussed in 5.3.3, but the main issue for this section is whether the BHA Appeal Board are alive to judicial reasoning at CAS. There are two appeal board cases which are of particular importance, Mullins (20/08/04) and the appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold, and Kirsty Milczarek (10/04/12) otherwise known as the ‘It’s a Man’s World’ case (see Appendix 2).

The Mullins<sup>320</sup> case was brought because of a doping allegation, and there are clear attempts by the appeal board to draw on both Strasbourg jurisprudence, domestic UK case law, previous appeal board findings, the WADA Code, FEI regulations, and CAS awards in order to achieve a fair and just result. There was an allegation by Mullins of bias which would contravene Article 6(1) ECHR and arguments surrounding the issue of proportionality of punishment. References were made to *Bradley v Jockey Club* (*supra*) and *Pepper (Inspector of Taxes) v Hart* [1992]

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<sup>319</sup> BHA Orders and Rules of Racing, available at <http://rules.britishhorseracing.com/Orders-and-rules&staticID=126230&depth=3> (accessed on 19/05/15).

<sup>320</sup> BHA Disciplinary Appeal Hearings, available at <http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/disciplinary/?result=535a2fbab33ebfaa5320e9b2> (accessed on 04/06/15).

UKHL 3 to settle a matter of construction. In Paragraph 63 of the appeal board award there is reference to *CAS 95/147* of the 22<sup>nd</sup> April 1996 and *Răducan v IOC*<sup>321</sup>. In rebutting a challenge to the strict liability principle, the board adopted a typically tautological form of reasoning essentially justifying the principle because other ISFs that operate under the WADA Code, also justify it in their findings:

‘The Anti-Doping Code considers doping a strict liability offence.... the mere presence of a forbidden substance in the urine sample is sufficient. This has been repeatedly confirmed by CAS’<sup>322</sup>.

This does no more than say that other SGBs use strict liability, so the BHA is entitled to without actually exploring the issues behind this. The board simply cites CAS cases *95/150 V v FINA*, *96/49 AC v FINA* and *98/208 W v FINA* in support. A Gramscian analysis of this would conclude very firmly that here is an ‘acceptance by the ruled of a conception of the world which belongs to the rulers’<sup>323</sup>, there is no attempt here to address the justice or otherwise of the provision. Finally, the WADA Code itself is consulted (the then Chapter 11 Art. 4.4) and the CAS ruling in *Baxter v International Olympic Committee (IOC)*<sup>324</sup> is reviewed as well as a case brought by the FEI, *CAS 94/126*. The FEI case was used to rebut an argument by Mullins that the original finding was flawed because there was no effect on performance from the drug.

It can be seen from the foregoing that in this one case there is significant use of CAS jurisprudence and WADA themes to arrive at a decision. On that basis, it might be concluded that there is considerable consistency in the jurisprudence of two of the major players in the equine sports world, the FEI and the BHA. Such a conclusion would be premature however, and it would not be too extreme to regard Mullins as a ‘one off’. In fact, the following case conclusively disproves any assertion that there is a consistent *lex sportiva* in the equine sporting world.

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<sup>321</sup> An Ad Hoc decision, CAS 2000/011.

<sup>322</sup> BHA Disciplinary Appeal Hearings, available at <http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/disciplinary/?result=535a2fbab33ebfaa5320e9b2> (accessed on 04/06/15).

<sup>323</sup> Berch Berberoglu, ‘An Introduction to Classical and Contemporary Social Theory: A Critical Perspective’, 3<sup>rd</sup> Edn. (Lanham, Maryland: Rowman and Littlefield Publishers Inc. 2005) 57.

<sup>324</sup> CAS 2002/A/376

The appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold, and Kirsty Milczarek (10/04/12) primarily concerned race fixing allegations. The appellants argued that the applicable standard was one of ‘beyond reasonable doubt’ not on a ‘balance of probabilities’. It was suggested that Schedule (A)6 para. 16, which stipulates the civil standard, pre-dated changes in domestic case law. These changes over-ruled cases where it was suggested gradations within the civil standard of proof were possible, *Re Doherty 2008 UK HL* and *Re B (Children)(FC) [2008] UKHL 35* were cited. The domestic case law referred to was authority for the contention that there might be times when a criminal standard may be applicable to a civil case where the subject matter was serious enough, such as in anti-social behaviour and sex offender order cases, however the BHA Appeal Board panel was satisfied that there was no such thing as a heightened standard of civil proof, as previous case law had indicated.

What is important for this research though is that for the BHA, the applicable standard in disciplinary cases involving horses was the civil standard of ‘on the balance of probabilities’. This august and venerable body had every opportunity in this case to bring the Rules of Racing into line with WADA Code compliant sports, including but not limited to, the FEI. They could have done this by distinguishing the relevant line of domestic case law and stating that in sport, to achieve consistency and harmony in disputes with an international dimension there has to be an attempt to try to ‘mesh’ both common law and civil code legal concepts. Thus, the applicable standard would be the upgraded civil standard ‘comfortable satisfaction’. This, however, they manifestly did not do. Whether the board was right to do that, and whether ‘comfortable satisfaction’ is a satisfactory concept, will be considered *supra*, but what matters here is that there is clear divergence in legal thinking between the BHA and the FEI. Specifically, cases under the auspices of each SGB are decided to markedly different standards of proof and thus are wholly incompatible. This is why it is so difficult to realistically argue that there is a consistent and coherent *lex sportiva* in equine-based sport, or alternatively that equine sport contributes in any useful way to any broader based notions of a *lex sportiva*. Why that matters so much will be considered in the next sections.

### 5.3 Crisis? What crisis?

British Prime Minister James Callaghan probably never said those words during the ‘Winter of Discontent’ in 1979. They have, however, come to epitomise the mindset of those who refuse to change direction, even in the face of an obvious predicament. In the introduction, it was posited that 2013 and 2014 represented a ‘watershed’ moment because, despite previous lengthy and redoubtable reviews which will be critiqued later, scandals continued and were particularly abundant in that period. This section seeks to explore that period in greater depth and see if the label ‘crisis’ is apt and to what extent problems continue to surface.

Sports involving horses do not generally command the lines of print or airtime that major sports such as football do, and consequently scandals and outrages that occur in, for example, horse racing or equestrianism, tend only to be the talk of those in the sector. This is except, of course, when criminal law and celebrity riders feature<sup>325</sup> and research indicates these are crucial factors in editorial decisions<sup>326</sup>. Integrity crises in football governance attract worldwide press attention and thus academic commentary<sup>327</sup>, but crises of equivalent concern to those competing with horses have received comparatively little attention from the mainstream media. It would be useful then to outline here what the issues for horses and sport have been, at least over the last decade-and-a-half.

This is an auspicious time to research drugs, wider integrity matters, sport and horses. Horse racing in the UK has commissioned two major reports concerning integrity since 2003, as well as other less extensive reviews. The 2003 Joint Security Review<sup>328</sup> was followed up by the Neville Review into Integrity in Racing in 2008<sup>329</sup> which together made several far-reaching recommendations for the future of racing integrity management, including with regard to the relative roles of the police and the BHA and suggestions for streamlining and focusing the Rules

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<sup>325</sup> ‘Fallon race-fixing trial collapses’ available at <http://www.theguardian.com/uk/2007/dec/07/sport.ukcrime> (accessed on 20/08/16).

<sup>326</sup> See Yvonne Jewkes, *Media and Crime*, (London: Sage 2004).

<sup>327</sup> See for instance Roger Pielke, ‘How can FIFA be held accountable?’ (2013), *Sport Management Review* Vol. 16, Issue 3, 255–267 and John Verver, ‘Lessons from the FIFA Corruption Scandal’ (2015), *Risk Management* 62.7: 16.

<sup>328</sup> See for instance Vamplew (n 130) 104.

<sup>329</sup> Executive Summary available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 22/08/16)

of Racing going forward. In addition, pursuant to doping allegations regarding the UK's largest flat racing operation – the Godolphin Yard – Lord Stevens carried out a review of those matters independent of the BHA in 2014, although parts of that review were never made public. In 2016, a further review was published led by the BHA's director of legal, integrity and risk, and overseen by Sir Paul Stephenson. This was initiated as a result of a 'desire to ensure the BHA remains at the forefront of the handling of integrity matters'<sup>330</sup>. A further review was led by Christopher Quinlan QC, and the recommendations made public in autumn 2016. The remit of this report was expanded to examine issues from the bitterly fought case against trainer Jim Best. The BHA is accused of procedural impropriety and the Quinlan Review was further asked to address 'the manner in which the BHA appoints disciplinary panel members, the qualifications necessary to sit on such a panel, whether the BHA should continue to use a QC who is also a licensed trainer to present its cases, the BHA's approach to disclosure, the use made of expert evidence and the manner in which the BHA presents its cases'<sup>331</sup>. The thoroughbred racing industry is clearly working hard to address integrity issues, and this is to its credit, however there has clearly been, and continues to be, work to do to ensure that racing is *perceived* to be a clean product.

Turning to equestrianism, the governing body of Olympic equestrian sport, the FEI has, and still is, dealing with some very difficult doping issues. In a press release issued on 3<sup>rd</sup> September 2009, the then FEI president, Princess Haya of Jordan stated:

‘...the FEI must turn a new leaf in order to guarantee its community a clean and uncorrupt product. The Stevens Commission and the Ljungqvist Commission have both painted a picture that illustrates how negligent we have been in this area thus far and our

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<sup>330</sup> The full document is available at: <http://www.britishhorseracing.com/bha/integrity-review/> (accessed on 22/08/16)

<sup>331</sup> Chris Cook, 'The BHA and Jim Best legal team in standoff over case rehearing date', (London: Guardian Online 12 August 2016) available at <https://www.theguardian.com/sport/2016/aug/12/british-horseracing-authority-jim-best-standoff-case-rehearing-date> (accessed on 22/08/16).

governing body is completely committed to rectifying the problems we now face, for the benefit of our athletes, our community and our public.’<sup>332</sup>

This was in part a response to the 2008 Beijing Olympics where six horses failed drugs tests<sup>333</sup> and because three riders were stripped of gold after doping allegations at the 2004 Athens Games. Despite this position statement, new controversies continue to emerge, contentious matters straddling the FEI sport of endurance and the separately governed world of horse racing. This is despite the governing bodies of each maintaining scandals in one sport do not taint the other because of their differing governance structures. As discussed already, these controversies have touched the husband of Princess Haya, Sheikh Mohammed bin Rashid Al Maktoum, racehorse owner and endurance competitor. The Sheikh has vigorously defended his flat racing operation against the negative press caused, and there will be extensive discussion on these points later, however a summary of the contested issues and their background would be useful here as a prelude.

The FEI, as a global sports governing body, encompasses the three Olympic equestrian sports of showjumping, dressage, and eventing and also para-dressage. It also regulates many diverse horse-based sports from western reining to horse-ball and carriage driving together with a considerable number of others<sup>334</sup>. Horse racing, by contrast is overseen by a variety of organisations<sup>335</sup> based largely at national level with differing rules for racing in different nations, in the UK this is the British Horse Racing Authority (BHA) formerly known as The Jockey Club. The International Federation of Horse Racing Authorities (IFHRA) exerts a degree of harmonising influence but does not equate to the FEI in form or function<sup>336</sup>. Sheikh Mohammed’s fourth wife, Princess Haya of Jordan is the previous president of the FEI, and the

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<sup>332</sup> FEI Press Releases available at: [http://www.prweb.com/releases/FEI\\_Equestrian/Lord\\_Stevens/prweb2824784.htm](http://www.prweb.com/releases/FEI_Equestrian/Lord_Stevens/prweb2824784.htm) (Accessed on 28/10/2013)

<sup>333</sup> Charlish (n 25) 1.

<sup>334</sup> FEI Website, available at: [www.fei.org](http://www.fei.org) (accessed on 28/10/13)

<sup>335</sup> Crossman (n 42) 41.

<sup>336</sup> IFHA Website available at: [www.ifhaonline.org](http://www.ifhaonline.org) (accessed on 28/10/13).

sheikh is the ruler of the Emirate of Dubai, rides endurance horses competitively, and owns the Godolphin thoroughbred flat racing stables<sup>337</sup>.

The FEI sport of endurance features riders competing to cover very long distances involving usually tens of kilometres. Endurance has international competitors from as far afield as Argentina, United States, Malaysia, and the Czech Republic<sup>338</sup> but is very popular in the Middle East because of the particular suitability of Arab horses for the sport. In April 2013, news was released that 11 horses at Sheikh Mohammed's Moulton Paddocks racing yard in Newmarket had tested positive for anabolic steroids. The BHA charged Godolphin trainer Mahmood Al Zarooni with a range of offences including conduct prejudicial to horse racing<sup>339</sup>. There was a connection made (by the press at least) with a second doping infraction at a flat racing establishment not far from the Godolphin premises a few days later<sup>340</sup>.

On 19<sup>th</sup> September 2013, it was reported in the equestrian press that the European Endurance Champion Jaume Puntí Dachs runs a yard for Sheikh Mohammed at Moorley Farm East, UK which was raided by the Veterinary Medicines Directorate (VMD) in August 2013.

Phenylbutazone, dexamethasone, and flunixin anti-inflammatories were seized<sup>341</sup>. On 29<sup>th</sup> September 2013, it was further reported that Sheikh Mohammed had ordered his 'junior wife' Princess Haya to head up an investigation into the seizure by the United Kingdom Border Agency (UKBA) of potentially toxic and unlicensed drugs incorrectly labelled as 'tack' on a Dubai Royal Air Wing flight at Stansted Airport, UK earlier in the year<sup>342</sup>. Princess Haya later handed that task to Lord Stevens. The negative press coverage accelerated the following day when it was alleged that Mubarak bin Shafya, banned from training endurance horses for doping with steroids and a former colleague of the now disgraced Mahmood Al Zarooni, continued to train thoroughbreds from a Dubai stable complex owned by Sheikh Mohammed<sup>343</sup>. Furthermore, of the three Endurance GB riders who have come before the FEI on doping charges, two were on

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<sup>337</sup> Riach (n 28).

<sup>338</sup> Watkins (n 33).

<sup>339</sup> Blitz (n 29).

<sup>340</sup> Frank Keogh, 'Newmarket trainer Gerard Butler faces horse racing steroids inquiry', (BBC Sport Online 29 April 2013), available at: [www.bbc.co.uk/sport/0/horse-racing/22336037](http://www.bbc.co.uk/sport/0/horse-racing/22336037) (accessed on 05/02/15).

<sup>341</sup> Watkins (n 30).

<sup>342</sup> Riach (n 28).

<sup>343</sup> Wood (n 32).

horses lent to them by organisations based in, or linked to, the UAE<sup>344</sup>. This press coverage led some to comment that there is a ‘conflict of interest at the top of the FEI’ and to the Swiss and Dutch Equestrian Federations opposing a proposal to allow Princess Haya to serve a third term of office<sup>345</sup>. The princess in fact since stepped down after completing her second term, on the election of Ingmar De Vos on 14<sup>th</sup> December 2014.

There have been further wrangles since the ‘New Leaf’ statement as well, chief among those were the doping cases involving horses competing in the high-profile Badminton and Burleigh 2013 eventing trials<sup>346</sup>. One of these was the winning horse ridden by New Zealand’s Jonathan Paget, which tested positive for the banned sedative, reserpine<sup>347</sup>, although this was not considered deliberate. In July 2014, one of Queen Elizabeth’s prize-winning racehorses, *Estimate*<sup>348</sup> also tested positive for morphine. These are also noteworthy because in neither case was there any suggestion that cheating had been found, yet in both cases, as is the norm, both placings and winnings were forfeited with the associated stigma that entails. This paradox will be a recurring theme in the pages to come, as will a critique of the failure of horse sport to come up with anything appreciably different to address the integrity crisis. As a whole it is ‘doing the same thing over and over again and expecting different results’ which is ‘insane’ according to Einstein<sup>349</sup>. The term ‘crisis’ seems appropriate as parading the unwary and naïve before the press as examples of how the fight against doping in horse sport is working is both morally wrong and ultimately counter-productive. This is especially if it is true that the morally culpable can weave their way around the regulations, a point that this research will investigate later.

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<sup>344</sup> FEI v Alice Beet (11<sup>th</sup> September 2006), FEI v Sue Sidebottom (28<sup>th</sup> July 2008).

<sup>345</sup> Watkins (n 33).

<sup>346</sup> Pippa Cuckson, ‘Jock Paget Suspended’, (London: Daily Telegraph 15 October 2013) available at: [www.telegraph.co.uk/sport/10379298/Jock-Paget-suspended-after-Burghley-winning-horse-Clifton-Promise-tests-positive-for-banned-substance.html](http://www.telegraph.co.uk/sport/10379298/Jock-Paget-suspended-after-Burghley-winning-horse-Clifton-Promise-tests-positive-for-banned-substance.html) (accessed on 25/11/2014).

<sup>347</sup> Flora Watkins, ‘Eventing world shocked as Burghley winner fails drugs test’ (Horse and Hound, 19 November 2013), Time Inc. (UK) Ltd.

<sup>348</sup> Gordon Rayner, ‘Queen’s Gold Cup-winning racehorse Estimate tests positive for banned drug morphine’, (Daily Telegraph Online 22 July 2014) available at: <http://www.telegraph.co.uk/news/uknews/queen-elizabeth-II/10984322/Queens-Gold-Cup-winning-racehorse-Estimate-tests-positive-for-banned-drug-morphine.html> (accessed on 02/11/15). Although this does not concern the FEI, issues common to equestrian cases came to the fore, for instance the possibility of contamination at source in proprietary feeds. See also Jonathan Merritt, ‘Oh, neigh: doping rules designed for humans are not fit for horses’ (2014) available at: <https://theconversation.com/oh-neigh-doping-rules-designed-for-humans-are-not-fit-for-horses-29687> (accessed on 15/01/15)

<sup>349</sup> This quote is often attributed to Einstein but is difficult to verify, other candidates include Benjamin Franklin and Mark Twain.



### 5.3.1 Can the *status quo* address cheating?

This seems a simple question and, *prima facie*, it is true that the regulations of both the FEI and BHA are designed to do just that. Whether this is really what happens requires a depth of analysis not carried out in any research to date. There is a lived reality in the horse sport sector which is not replicated in human only sports to any appreciable degree. Specifically, it would be strange indeed if there were Premier League footballers sharing a dressing room with Premiership rugby players even if each team walked out onto quite different pitches to play to quite different rules. It would be difficult to countenance a situation where a coach, banned from coaching rugby players for trafficking PEDs, could cross the changing room floor to coach the footballers without any sanction. The equivalent of this however is possible with horse racing and certain FEI disciplines. This is one of the practical consequences of the piecemeal governance arrangements in equine-based sport and the lack of a real *lex sportiva* where horses are concerned. It is quite possible for one owner to maintain a string of thoroughbred racehorses and a separate string of Arab or Arab-cross horses for FEI endurance competitions in the same or closely neighbouring yards. This gives rise to the *interface problem* referred to already in this thesis and a term specifically coined for this research. It is also possible for a trainer to be sanctioned for a doping offence by one SGB, but be able to continue to operate quite legally with horses under another SGB in the same or a neighbouring yard. Alternatively, he or she can operate from another yard owned by the same owner even if it is some distance away. How this can happen will be examined in more detail later.

### 5.3.2 The spread of spot betting

The relationship between sport and gambling is an old one, for Forrest almost as old as modern sport itself<sup>350</sup>. Throughout this history, the major sports have had crises of integrity centred on betting; cricket and baseball for instance were both tarred with allegations of match fixing well before the turn of the 20<sup>th</sup> century, never mind the millennium<sup>351</sup>. The level of concern however about betting, integrity, and sports is new. In 2012, the then director general of WADA called for

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<sup>350</sup> David Forrest, 'Betting and the Integrity of Sport' in Paul Anderson et al., 'Sport Betting: Law and Policy', (The Hague: T.M.C. ASSER Press 2011) 14.

<sup>351</sup> *Ibid.* 15.

a world sports integrity agency modelled on his organisation to combat ‘doping, betting, bribery and corruption’<sup>352</sup> issues. Howman cited the difficulties individual SGBs have in what is effectively a fight against organised trans-national crime that even state policing agencies struggle to tackle effectively. Howman cites estimates that the criminal underworld now ‘controls’ at least 25% of world sport<sup>353</sup> in support of his argument. Forrest notes that in this century SGBs have commissioned reports into this problem, some of which have been investigated at length in this thesis, adding that the IOC has since the 2008 Games required all Olympic athletes to declare they are not involved in betting. UEFA now has a state-of-the-art system for monitoring betting patterns worldwide and the UK Government in 2010 ‘set out policy requiring sports to defend themselves against fixers’<sup>354</sup>. The Department for Culture, Media and Sports instruction was not limited to the obvious sports either, i.e. horse racing and football, all sports are expected to be alive to the possibility of betting generated corruption. Forrest goes on to cite examples of opportunities from cricket, basketball, tennis, baseball, darts, and snooker where athletes have already or could potentially throw a game or cause a certain in-play event to occur in return for money<sup>355</sup>.

There is more than one driver for the increased fear of betting-generated corruption. For Forrest, there are five reasons; firstly a huge growth in liquidity generated by far greater amounts wagered than previously in turn generated by relatively minor sports getting ‘airtime’ via television or the internet. The entertainment or ‘excitement value’ is multiplied by having a financial stake in the outcome of what is being viewed live. Secondly, bookmakers’ margins have been driven down by the internet, allowing gamblers to shop around, often globally, for the best odds. Consequently, transaction costs are lower and bribing more profitable. In addition, bookmakers are more likely to be less concerned about what sort of bet they take, meaning betting on single events is more likely. Linked to this is an increase in ‘live’ or ‘in-play’ betting, often ‘proposition’ or spot betting being possible because of the new technology. This makes it

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<sup>352</sup> David Howman, ‘Supporting the Integrity of Sport and Combatting Corruption’, (2012) 23 *Marq.Sports L. Rev.*, 247.

<sup>353</sup> *Ibid.*

<sup>354</sup> Department for Culture Media and Sport (2010) Report of the sports betting integrity panel. Department for Culture, Media and Sport, London.

<sup>355</sup> Forrest (n 350) 23.

more likely that betting on unknowns after the start of play will be attractive. The timing of the first throw-in during a soccer match, or the number of red cards shown, are examples of this and each are relatively easy to fix by individual players, making it unnecessary to bribe a whole team. Finally, the emergence of betting exchanges makes it possible to bet on someone or something to lose, which can be illicitly procured much more easily than securing a win<sup>356</sup>.

Betting on horse racing has an established history, and is either tolerated and regulated, such as in the UK<sup>357</sup>, tolerated, regulated, and highly restricted such as in India and Canada, or illegal but nevertheless carries on in such countries as Pakistan and many US states. The BHA's strenuous efforts to protect the sport's integrity in the UK have been documented earlier, but equestrianism has no such history of volume betting, nor of a problem with betting-related corruption. Forrest warns though of complacency in sports with this profile, choosing instead to cite golf and badminton as examples, but many of the risk factors he discusses apply to equestrianism. Liquidity is the 'greatest friend of the fixer as it enables large amounts of money to be fed into the market without driving the odds inwards...and attracting undue attention'<sup>358</sup>. Liquidity is highest in sports such as football, as one might expect, but consideration of liquidity, however, cannot be divorced from discussion of levels of wages in a given sport. Essentially for Forrest, where wages are low there is vulnerability to this kind of corruption. As in any 'criminal' activity, a person considering taking a bribe usually acts out of rational choice; Bentham's 'pleasure –pain' dynamic at play in other words<sup>359</sup>. The sportsperson must weigh the cost of being discovered against the financial reward of accepting the bribe. Low level football competition and darts are examples where there are relatively low player wages and/or low levels of prize money<sup>360</sup>. There are a number of reasons why equestrianism is just as vulnerable to spot betting and associated match fixing simply by following Forrest's logic. Sports which have distinct stages in them are particularly attractive to fixers, examples include tennis and darts 'sets'. A player may be bribed to lose a set and the gambler can bet against the player before the match starts, then take advantage of the lengthened odds recalculated after the lost stage. This

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<sup>356</sup> *Ibid.* 18-22.

<sup>357</sup> Gambling Act 2005

<sup>358</sup> Forrest (n 350) 19.

<sup>359</sup> Newburn (n 60) 117-119.

<sup>360</sup> Forrest (n 350) 23.

can now occur ‘in-play’ as the gambler places a bet for the player to win and with the right stake profit is virtually guaranteed<sup>361</sup>. In eventing, for example, there are three distinct stages; the dressage, cross-country, and show-jumping phases. It would be an attractive proposition to both rider and gambling syndicate for the rider to be persuaded to throw, say, the dressage or cross-country phase. This could be done with ‘errors’ that would be extremely difficult to detect as deliberate. A tiny change in the position of a spur during the dressage stage for instance, which produces a different gait, would be almost undetectable to the naked eye. An ‘error of course’ or forgetting the pattern can happen to the very best. The Dressage World, European and Olympic number one Charlotte Dujardin genuinely made such an error at the 2013 European Championships<sup>362</sup> as did two of her co-competitors at Grand Prix level. If that can happen to such experienced sports people in pure dressage, an error like that (but deliberate) could pass undetected in the dressage stage of eventing.

Forrest also draws attention to the culture of ‘tanking’ in tennis, whereby players opt to play at less than their best to cope with the unrelenting pressure of the tournament merry-go-round<sup>363</sup>. In this way of operating, players throwing a game may go unnoticed and, as a double ‘benefit’, the feelings of guilt and shame experienced by a player, which they must factor in to the ‘pleasure-pain’ dynamic mentioned earlier, can be lessened as they were not planning to try very hard anyway. In like vein, riders in either show jumping or eventing sometimes opt to try out horses that are inexperienced or returning from injury as a ‘second ride’. If this horse tires, refuses, or knocks too many fences down they will ‘retire’ the horse before the end of the run of jumps to avoid stressing the animal or even injuring it. The rider does this safe in the knowledge they have another horse with which they can attempt to win. There is a parallel with ‘tanking’ in that should the second ride not perform particularly well, and the rider pull it up mid-competition, that could be pre-arranged and also be very difficult to criticise. The odds on the rider winning on any ride could lengthen ‘in-play’ and profit guaranteed in a similar way to that described by Forrest in relation to tennis. More simply, a spot bet could be placed on the rider and horse

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<sup>361</sup> *Ibid.* 20.

<sup>362</sup> ‘Charlotte Dujardin wins European individual dressage title’, (BBC Sport Online 23 August 2013) , available at <http://www.bbc.co.uk/sport/0/equestrian/23817445> (accessed on 18/08/15).

<sup>363</sup> Forrest (n 350) 20.

combination not completing that phase of the competition, the bribe is accepted and the rider perhaps feels less shame and contrition as that ‘ride’ was not necessarily their main hope for a placing anyway.

One of the highest risks in all disciplines are competitions of relatively little consequence for the

**Figure 6 – Hoketsu (71) competing in the 2012 Games**



competitor, Forrest cites ‘dead rubbers’ in cricket as an example where the outcome of the tournament is already decided<sup>364</sup>. Professionals monitoring equestrianism for signs of spot betting would be well advised to focus on legs of international competition at the stage where the winner or winning team is all but a foregone conclusion. These stages in a

competition in other sports have been the subject of allegations and proven cases of corruption<sup>365</sup>.

Finally, Forrest notes that veteran sports people have least to lose in taking a bribe, the cost of losing a career from being found out is less and thus less likely to outweigh the benefit of the financial ‘incentive’<sup>366</sup>. It is worth positing that equestrianism is particularly at risk here.

Veterans in many sports may no longer be able to compete beyond a certain age, this is most marked in sports like gymnastics where an athlete may only be at their best in their teens. The middle ground might be inhabited by the likes of football, where professional players in their thirties are not unknown, although not common. At the other extreme is equestrianism where it is quite possible for an elite show jumper to be still competing at the top level at 50 years old<sup>367</sup> or dressage at 60<sup>368</sup>, the oldest equestrian competing at the Olympics was in fact 71 at the 2012 London Games. Hiroshi Hoketsu<sup>369</sup> rode for Japan and is the third oldest Olympian ever, the

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<sup>364</sup> *Ibid.* 23.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.*

<sup>367</sup> Roger Yves Bost (France) born 21<sup>st</sup> October 1965.

<sup>368</sup> Richard Davison (GB) born 20<sup>th</sup> September 1955.

<sup>369</sup> ‘Oldest 2012 Olympic Athlete – aged 71’ (BBC Sport Online 1 August 2012) available at: <http://www.bbc.co.uk/news/world-asia-19073349> (accessed on 19/08/15).

second oldest also being an equestrian at the 1936 Games. To put it another way, older athletes are relatively common in equestrianism, although there is no intent here to suggest those named in this thesis are in any way connected with wrongdoing. The reason why these athletes might be the most likely to fit with Forrest's analysis (that an athlete is most vulnerable to taking a bribe at the end of their competing career) is that they would be the nearest to 'complete' retirement as opposed to retirement from competition, but in anticipation of a coaching or managing career. This is the point at which there would be the least financial repercussions from being discovered as corrupt. In contrast, a veteran gymnast or cricket player still has to earn a living somewhere for the rest of their working life, sometimes in punditry, as an agent, or some other aspect connected with sport. This second career could therefore still be threatened by a corruption allegation.

The question then is whether the governance *status quo* could respond effectively to any concerted spread of betting-related corruption, particularly regarding 'spot' betting, to equestrianism. This section has established that equestrianism is a sport which displays some if not all the risk factors which make it at risk from betting corruption. The giants of cricket and football have their well-known problems, but it is also apparent that other sports cannot afford to be complacent just because they have no history or culture of volume betting. Bodies such as WADA, and even the UK Government, are calling or mandating for policy review in all sports to tackle the issue.

At present though the ability of the FEI to tackle betting corruption must be open to question. Liaison and information sharing with the BHA would be difficult because the governance regimes are so different, and the FEI has no equivalent integrity unit of its own with its focus having been almost exclusively on the fight against doping. This is a significant problem and one which is derived directly from the dislocation in equine sports governance.

### **5.3.3 Endurance, horse racing and the *interface problem***

In 2000, New Labour's policy document on sport identified that '[t]he organisation and management of sport is fragmented and too often unprofessional'<sup>370</sup>, and it is the disjointed

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<sup>370</sup> DCMS (2000) *A Sporting Future For All*, London: DCMS, 6.

nature of equine sport governance that is a major cause for concern presented by this research. Extracting the most relevant of the controversies described in the preceding part of this chapter illustrates what is meant by the *interface problem*. The bin Shafya matter was introduced in 5.3. In April 2013, the BHA charged Godolphin trainer Mahmood Al Zarooni with offences which included conduct prejudicial to horse racing<sup>371</sup>. Within six months it was reported that Mubarak bin Shafya had been found to be training thoroughbreds from a Dubai stables owned by Sheikh Mohammed, Al Zarooni's former employer. What is particularly pertinent about that for the arguments in this section is that bin Shafya had been banned from training endurance horses for doping with steroids and that he was a former colleague of the now disgraced Mahmood Al Zarooni<sup>372</sup>. This, of course, all predates the advent of the WADA and now FEI EADCMR clauses on 'Prohibited Association', but not the BHA equivalent. In any event, it would be very useful now to discuss how effective either provision would be in addressing a problem like this should it occur post 1<sup>st</sup> January 2015. It is worth noting that it is unclear yet whether the WADA provisions on prohibited associations, and thus those the FEI would seek to enforce, will be the subject of legal challenge in such jurisdictions as the United States, because of their civil liberties implications. We can, however, consider how the FEI and BHA provisions might work in practice, bearing in mind all the time that horses competing under the governance of both could be owned by the same person or small group of people and operate from the same yard. The effectiveness of each set of rules on association *vis-à-vis* competitors, owners, and trainers from the other equine sports will be considered in turn.

#### **5.3.3.1 Persons sanctioned by the FEI**

A person sanctioned for an infraction under the EADCMRs could not ride or train other horses that operate under FEI rules. Articles 2.9.1 and 2.9.2 are clear enough on that as a prohibited association with other competitors and owners on the yards would be unavoidable. The real question is whether such a sanctioned person could 'legally' train racehorses that race under BHA rules and associate with their human counterparts. The relevant provision in the Rules of Racing is reproduced again here, Rule (A) 30:

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<sup>371</sup> Blitz (n 29).

<sup>372</sup> Wood (n 32).

‘30.3 A Person must not in connection with horseracing in Great Britain associate with

30.3.1 a Disqualified Person; or

30.3.2 a Person who is excluded under Rule 64....<sup>373</sup>.

This research has already established that, from Rule (A) 68.1 a ‘disqualified person’ is someone disqualified by a ‘Recognised Racing Authority’ and Rule 64 concerns the very wide discretion the BHA has to exclude persons from premises within its jurisdiction. Should a trainer like bin Shafya or Al Zarooni be rendered ineligible by a breach of the current version of the EADCMRs then there would be a legitimate case to be made that there were no grounds for an exclusion under Rule 64 notwithstanding its wide reach as drafted. This is because of the incompatibility of BHA/FEI disciplinary proceedings. It is true that ‘comfortable satisfaction’ appears to be the higher standard of the two, but as this research has proven, this is a standard of proof the BHA Appeal Board has explicitly rejected pursuant to similar conclusions in UK domestic law. It is a further unfortunate fact that this commentary can only apply to the UK because, despite racing’s global impact, it is not possible in a work of this size to ascertain if all the other ‘Recognised Racing Authorities’ apply the same judicial reasoning and have the same rules, word for word. This is because as already proven there is no guaranteed consistency between the rules pertaining to race horses operating in different nation states. The same logic would apply equally to riders as well as trainers, however it must be acknowledged that the likelihood of a rider crossing between horseracing and FEI sports must be limited by respective physical build requirements. Put another way, many but not all riders in the Olympic disciplines for instance would be too heavily built to ride race horses.

It is pertinent now to turn to the position where a person is ineligible by virtue of a BHA disciplinary finding and to consider whether they could train horses competing under FEI rules without a breach of Article 2.9.1 and 2.9.2 of the EADCMRs.

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<sup>373</sup> BHA Orders and Rules of Racing, available at <http://rules.britishhorseracing.com/Orders-and-rules&staticID=126195&depth=3> (accessed on 28/05/15).



### 5.3.3.2 Persons sanctioned by the BHA

The changes to the EADCMRs consequent on the January 2015 amendments to the WADA Code prohibit certain associations. These are professional associations with a person who ‘has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person’<sup>374</sup>. The key words here are ‘if Code-compliant rules had been applicable to such Person’. This is an important phrase as the standard of proof is markedly different under the Rules of Racing compared to that in the FEI’s (code-compliant) EADCMRs. An FEI tribunal and also CAS would require that the doping finding is proved to the ‘comfortable satisfaction’ of the panel. The BHA’s Appeal Board rejected any other standard of proof other than ‘on the balance of probabilities’<sup>375</sup>. This is the civil standard in most Anglo-American legal systems. This standard is represented by the simple statement that it is ‘more likely than not’ that they are liable. This research will return to a consideration in detail as to what ‘comfortable satisfaction’ actually is, but suffice it to say for now it is a higher standard than on the balance of probabilities. Consequently, it does *not* follow that someone found liable for a breach of the Rules of Racing would have been similarly found liable of a ‘violation of anti-doping rules if code-compliant rules had been applicable to such Person’. Indeed, it is hard to see how such a conclusion could be reached unless the previous doping case that had been before the BHA Appeals Board, now considered by an FEI tribunal under a ‘prohibited association’ allegation, were retried from first principles under the FEI rules in a kind of ‘voir dire’.

The situation may be worse than that described above, it seems that there can be little confidence that a person sanctioned by the BHA for a doping offence could even necessarily be prevented from working in the same industry but overseas. This research has considered the cases of Dwyer and Hughes before the BHA Appeal Board and they indicate that the reciprocity envisaged by the promoters of the *International Agreement on Breeding, Racing and Wagering* may be more

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<sup>374</sup> EADCMRs, Effective 1<sup>st</sup> January 2015, Art. 2.9.2.

<sup>375</sup> The *It’s a Man’s World* Case, properly known as Appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold, and Kirsty Milczarek (10/04/12) available at <http://www.britishhorseracing.com/resources/about/whatwedo/disciplinary/disciplinaryDetail.asp?item=096634> (accessed on 21/04/17), see also Appendix 2.

apparent than real. If there is a lack of consistency between the procedures of the BHA as a disciplinary body and those utilised by the overseas racing authority, it is evidently open to either party to refuse to implement Article 10 of the Agreement in any given case. Admittedly in Hughes, the appeal board pointed out that Rule (A) 69.1 is an alternative way to prevent suspended jockeys racing in the UK:

69.1 This Rule applies where a Jockey or a person who holds an amateur rider's permit granted by the Authority has been suspended from riding by a Recognised Racing Authority.

69.2 The Jockey or amateur rider must not ride in any race on any day when such suspension is effective.

However, this would seem to have no effect in relation to working with horses and colleagues while suspended consequent to anything other than misconduct arising from riding in a race. It would not assist in a hypothetical future case similar to that of bin Shafya or Al Zarooni, i.e. involving other stakeholders like trainers.

To conclude then on the *interface problem*, where horseracing and FEI sports such as endurance meet, is a real conundrum. This is a problem which cannot be solved while there are disciplinary rules and procedures applicable to each SGB that differ in such fundamental ways. There is commentary suggesting that issues relating to the existence or otherwise of a true '*lex sportiva*', or in this case *equinae lex sportiva*, are an issue of 'academic rather than practical interest'<sup>376</sup>. The *interface problem* is an example of why such remarks are so unfortunate. It is also the *interface problem* which underlines the need for a separate area of academic study, under the general sports law heading, which deals exclusively with equine sports law.

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<sup>376</sup> Lewis and Taylor (n 12).

## 5.4 Conclusion

This work so far has sought to address the disciplinary crisis in horse sports by beginning to analyse the regulatory *status quo* across the major sports. This has required both an examination of the fundamentals of the way horses in sport are socially constructed, and deconstruction – to the molecular level – of sports governance to apply that understanding to horse sport. Taking a Gramscian approach, this research seeks to introduce a new ‘world outlook’ for those involved in horse sport and that can only be done if the most basic precepts and tenets of the current hegemony are questioned. This was done with the radical change approach explicit in the *radical humanist paradigm*. The ‘emergent social processes’ that sports governance regimes are, have been painstakingly taken apart. The notion of a *lex sportiva* is examined and, with the exception of EU sports law and the emanations of CAS and other SGB tribunals, considered to be best described as a contested concept. Therefore, for this research an interpretation of the term was adopted which takes it to mean the emanations of CAS on equestrianism and the BHA Appeal Board on horse racing. This does not exclude the domestic cases which have arisen from those awards. It was further proposed that a sub-genre of *lex sportiva*, that of *equinae lex sportiva*, should be a field of academic and practical enquiry in its own right because of the peculiarities in equine sport regulation.

The true nature of the *lex* in this construction of *lex sportiva* was also debated. Some commentaries acknowledge the ‘soft law’ aspects of sports law, because it seeks to promote Corinthian Ideals as examples of soft law’s typically ‘vague aspirational goals’<sup>377</sup>. It is true that much of the internal rules of sports, and thus the decisions made under them internally, are not law in the traditional sense. They are, however, underpinned by the law of contract and thus can result in awards enforceable by the domestic courts, and even internationally, by virtue of the *New York Convention*<sup>378</sup>. With that in mind, they are at the ‘hard’ end of Abbott and Snidal’s continuum. This takes nothing away from the consistent thrust of this research that the perception of law, and in particular law in sport, is most usefully considered subjective. This is because its structures and outcomes – its reality, in other words – exists only in the minds of

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<sup>377</sup> Karlsson-Vinkhuyzen and Vihma (n 241) 400.

<sup>378</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

those subject to it. Therefore, *lex sportiva*, and most importantly, *equinae lex sportiva*, despite being categorised as hard law, displays some important characteristics of soft law. Put another way, the important point for this research then is not that *lex sportiva* is soft law, but that it shares with that concept notions of the subjectivity and aspirational goals that soft law is characterised by. With that in mind, it is possible to chart a path towards radical change. This is because if a new ‘world outlook’ for those involved in equine sport can be articulated with sufficient persuasiveness, then the fundamental changes this research points towards are real and possible. To illustrate the subjective nature of *lex sportiva* as defined as in this research, the sporting examples of Maria Sharapova<sup>379</sup> and the infamous Lance Armstrong<sup>380</sup> can be cited. Neither were in the first flushes of their sporting careers when they faced doping allegations, therefore neither had their sporting chances greatly affected, even with the weight of the opprobrium heaped on Armstrong. Therefore, whether the outcomes of the sports law proceedings mattered to them was entirely subjective. Separate to that there were financial consequences, significant for Armstrong, but not as severe as one might expect perhaps<sup>381</sup>; likewise, Sharapova lost some, but not all, of her sponsors<sup>382</sup>. Nevertheless, these were the result of civil law provisions, such as morality clauses, applied to collateral contracts of endorsement and CAS does not have the jurisdiction to cancel these contracts under sporting rules. These are hard law consequences and vary little in principle to proceedings under contract in any sphere; the fact is there was a breach and a court can, if necessary, enforce that. There are exceptions of course, a case like *Matuzalem (supra)* is essentially an action for damages under a breach of contract. Further, whether or not Matuzalem’s career continued, those damages would be a real consequence for him. However, proceeding on the basis that the most important thing about sports governance rules and disciplinary findings is their subjective worth, this means that a new

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<sup>379</sup> Kevin Mitchell, ‘Maria Sharapova receives two-year ban for failing drug test’, (London: Guardian Online 8 June 2016) available at: <https://www.theguardian.com/sport/2016/jun/08/maria-sharapova-banned-two-years-failing-drugs-test-meldonium> accessed on (20/04/17).

<sup>380</sup> USADA U.S. Postal Service Pro Cycling Team Investigation, available at <http://cyclinginvestigation.usada.org/> (accessed on 21/04/17).

<sup>381</sup> ‘The cost and consequences of Lance Armstrong ban’ – available at <http://www.firstpost.com/sports/the-cost-and-consequences-of-lance-armstrong-ban-493276.html> (accessed on 21/04/17).

<sup>382</sup> Tariq Panja, ‘Head Stays Loyal to Sharapova After Other Sponsors Suspend Deals’, (Bloomberg Online 3 October 2016) available at <https://www.bloomberg.com/amp/news/articles/2016-03-10/head-stays-loyal-to-sharapova-after-other-sponsors-suspend-deals> (accessed on 21/04/17).

*weltanschauungen* is a realistic proposal, as it only requires that sports participants, sport's rulers, and other stakeholders be convinced of the need for radical change.

A particular study of the giants of the equine sports sector, that is horse racing and the sports governed by the FEI, the term 'crisis' is apt. There are real problems achieving more than catching out those who are not careful enough and then using these cases to demonstrate that regulatory rules are 'working'. Review after review of integrity matters does little other than make adjustments to the existing regime without going back to first principles. The exact context and most important findings of these reviews is the subject of a series of sections in Chapter 6.

In order to prove how incompatibility between the regulations and proceedings of different equine SGBs can impact at the 'coal face', this chapter points out by way of example that there is virtually no consistency or commonality between the disciplinary regimes of the BHA, other national racing authorities, and the FEI in any fundamental sense. The consequence of this is that it is difficult to see how those sanctioned by one SGB can be prevented from working with horses, riders, and other professionals under the auspices of another SGB. The WADA Code effective from 1<sup>st</sup> January 2015 has been amended to include 'prohibited association' and the FEI has quickly followed suit. This is something which, in spirit if not in form, has been part of the BHA Rules of Racing for some time. Notwithstanding this, an analysis of the wording of both sets of rules expose *lacunae* which mean that cases like that of bin Shafya continue to be difficult to address. This *interface problem* occurs when owners or trainers operate horses on the same or connected yards, but in two distinct disciplines operating under completely different governance. The case of endurance horses and racing thoroughbreds being stabled together was the focus of this chapter. In theory though, the same problem might be found in other circumstances; American quarter horses trained for the reining discipline under the FEI might be owned and trained by the same individuals who own racing thoroughbreds for use on the US horse racing circuit for instance. Quarter horses are regularly used on US race tracks to catch loose horses because of their outstanding sprinting capability and would be stabled in close proximity to race horses. In the UK, racing thoroughbreds have relatively short careers and may go on to compete

in other disciplines<sup>383</sup> at the elite level. It is likely that there will remain a connection, either in terms of personnel or physically in terms of premises. The real worlds of sports horses involved in different sports are not as distinct and separate as the governing bodies would like to believe. There has been a welcome development in the IHSC but on current evidence there seems appetite for more than knowledge sharing.

Beyond the *interface problem*, the study points to some very real consequences to the lack of, or at least lack of consistency of, any real *lex sportiva* at all in relation to sports involving horses. This is not mere academic musing, it hampers the governance of these sports on the ground. For instance, there are issues that are bound to come to the fore in the not too distant future to do with genetically modified, albeit non-human, athletes. There are already cloned animals in elite competition<sup>384</sup>, and commercial mass production may be just around the corner<sup>385</sup>. At the moment, these methods are viewed as another legitimate breeding technique, but it does seem odd in the extreme that competing on an animal that has been genetically engineered from hoof to ear-tip is not considered cheating. Paradoxically, traces of opiates or even chilli peppers from contaminated feed can result in a ban and loss of winnings. Suffice it to say there is little evidence that the debate on this conflicting position has even been had.

If cloning is going to happen beyond an experimental level, the equine sporting world needs a wholly consistent approach to the fundamentals in this controversial area, even a redefinition of the concepts of ‘cheating’ and ‘fair play’. Consistent regulation across the equine sporting world will be needed, something that the current governance arrangements have consistently failed to do in relation to longer established challenges to integrity. The rules on doping were developed for humans and contorted to suit horses and the unfortunate consequences of that will be the preoccupation of much of the rest of this thesis. With cloning and genetic modification, the

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<sup>383</sup> Just by way of example, successful racehorse *Denman* went on to work in a professional hunt and the late *Kauto Star* began a career in dressage. In no way is this an implication that they or their support personnel owners or trainers are involved in any wrongdoing however.

<sup>384</sup> Pippa Cuckson, ‘Clone of ‘best ever horse’ Gem Twist is bought by Olympic show jumping owner’, (London; Telegraph Online, 7 July 2012) available at: <http://www.telegraph.co.uk/sport/olympics/equestrianism/9383567/Clone-of-best-ever-horse-Gem-Twist-is-bought-by-Olympic-show-jumping-owner.html> (accessed on 21/04/17).

<sup>385</sup> Neil Connor, ‘China ‘cloning factory’ to produce cattle, racehorses and pets, (Telegraph Online 24 November 2015), available at: <http://www.telegraph.co.uk/news/worldnews/asia/china/12013158/China-cloning-factory-to-produce-cattle-racehorses-and-pets.html> (accessed on 21/04/2017).

likelihood is that the rules will be developed first with horses because the application of this science to human athletes *en masse* is further down the track. It will not suffice for these rules to be simply an addendum to the doping and controlled medication provisions currently in force. It certainly will not do either to assume that the rules developed for genetically modified and cloned animal athletes can be borrowed with minimal amendment and used for another species, man.

## Chapter 6 – Problematising strict liability and the current rules of evidence

*Show me your horse and I will tell you who you are* (English Proverb)

### 6.1 The particular inequities for equine sport

There are examples of glaring inequities for sports people caught up in doping integrity cases without any need for moral culpability. This research has already established that fact in the section on ‘crises’ for these sports. Conversely *prima facie*, there is no guarantee that the regulations as they currently stand are capable of catching the serial dopers and determined cheats connected with horse sport. The lack of moral culpability is of special concern regarding equine sport because this has within it competitors as teams of two athletes, one human, one non-human. Jonathan Swift wrote that ‘laws are like cobwebs which may catch small flies, but let wasps and hornets break through’<sup>386</sup> and using a doctrinal approach, the next section of the research considers the extent to which Swift’s words may apply to equine anti-doping rules. To begin with, the concept of strict liability in criminal law is considered because many of the concepts found in anti-doping and other integrity sports regulations mirror those found in common law criminal justice. In fact, the literature contains considerations as to whether the WADA Code is in fact a quasi-criminal system *inter alia* because of its punitive sanctions<sup>387</sup> and thus it is unsurprising that it is heavily influenced by criminal law. What is surprising however, is that it borrows *so heavily* from common law criminal justice systems, a point that shall be further explored later.

#### 6.1.1 A critique of strict liability generally

In domestic, mostly criminal, law, strict liability is presented on a number of grounds. Before moving on to discuss how those grounds and others are used as justification in sport, there needs to be an analysis of the criminal law arguments. These predominantly centre around; (1)

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<sup>386</sup> Cynthia Cates and Wayne McIntosh, *Law and the Web of Society*, (Washington: Georgetown University Press, 2001) 191.

<sup>387</sup> Downie (n 48) 16-17.



protecting scarce prosecution resources, (2) the closely linked point that if the primacy of (1) produces the occasional injustice, this is immaterial as there is no appreciable moral stigma attaching and (3) the deterrent effect of ease of prosecution. These points will be discussed in turn and their pros and cons evaluated.

#### **6.1.1.1 Strict liability is a protection of scarce resources**

Strict liability is considered justifiable, or at best a necessary evil, because it would be a strain on prosecution resources to have to prove *mens rea* in some minor crimes. This means minor in the sense that they are largely confined to matters of a regulatory or administrative nature. Further, that this could ultimately mean that these crimes were all but impossible to successfully prosecute. In the criminal law of England and Wales, and the Anglo-American legal systems on which it has had most influence, strict liability is relatively common. In a study by Ashworth and Blake in 1996, about 45 percent of all criminal offences in English and Welsh law were found to be strict liability<sup>388</sup>. In support of this ‘practicality’ argument, examples are drawn from traffic law enforcement. *Inter alia*, such as the near impossibility of showing that a person intended or was say, *Cunningham* reckless<sup>389</sup> as to breaking the speed limit or disregarding a red traffic signal and corporate crimes present similar difficulties<sup>390</sup>.

The point made is that without strict liability, it will become too difficult to prove guilty mind. This is because in a criminal court, *mens rea* would have to be proved to the standard of beyond reasonable doubt. This is a high standard and why *mens rea* is not considered at the liability stage, but is *de facto* encountered at the sentencing phase. This is because the standard of proof as to which sentence will be the most appropriate is no longer anything like so high, if there can be truly said to be a standard of proof at this juncture at all.

The UK, like most of the world, is slowly emerging from an economic crisis and in many western democracies, public spending has been severely curtailed since 2008. ‘Austerity’ may

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<sup>388</sup> See A. Ashworth and M. Blake, ‘The Presumption of Innocence in English Criminal Law’ (1996) Crim LR 306.

<sup>389</sup> i.e. subjectively so, *R v Cunningham* [1957] 2 QB 396

<sup>390</sup> Simister (n 98) 28.

have become an unpopular word since the election result of 2017<sup>391</sup>, but budgets and personnel in the public sector are still under great strain. Now, more than ever, criminal justice policy that is cautious with those budgets is likely to have primacy.

The problem with an argument based on cost saving is that this prudence may be more apparent than real. This is because, although the prosecution and the court do not have to grapple with issues of moral fault in the liability portion of a trial, they do have to address these issues in the sentencing phase. As well as the impact on the victim, sentences have to reflect an assessment of the pattern of behaviour. This must include consideration of whether they intended to do what they did or were reckless at a time of extreme stress and unlikely to repeat the offence. Therefore the ‘guilty mind’ of the offender has to be considered so as to select a sanction which is proportionate and likely to be effective. This is done by consideration of pre-sentence reports, a time-consuming process<sup>392</sup>. It is hard therefore to see why moral and *mens rea* arguments would be prohibitive in terms of resources at the liability stage as time and money must be spent on presenting and countering arguments that particular sentences will be more or less effective. This, in turn, is based on the state of mind of the defendant. It is accepted however that this does not apply to offences dealt with by way of fixed penalty notices.

There is also a moral objection to the cost saving arguments. They are tantamount to arguing that it is too difficult to achieve a just outcome, so therefore courts should automatically convict. As Cicero put it, ‘the foundation of justice is good faith’<sup>393</sup>. That strict liability is simply cheaper comes from a morally repugnant stance and could only be condoned by a legal system without ‘good faith’ at its core. Justice is difficult to achieve and is expensive; neither factor justifies not attempting to achieve it at all. This is especially so when one considers the lack of concern about unjust convictions is closely allied to the position that most strict liability offence guilty verdicts do not attract a high moral stigma.

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<sup>391</sup> The severe curtailment of the Conservative Party’s majority in Parliament in June 2017, was largely seen as a rejection of their economic policies as well as a reaction to the direction of ‘Brexit’ negotiations, if not ‘Brexit’ itself.

<sup>392</sup> S. 158 Criminal Justice Act 2003 and see CPS guidance at [http://www.cps.gov.uk/legal/p\\_to\\_r/provision\\_of\\_pre\\_sentence\\_report\\_information/#Pre-Sentence\\_Reports](http://www.cps.gov.uk/legal/p_to_r/provision_of_pre_sentence_report_information/#Pre-Sentence_Reports) (accessed on 16/07/13).

<sup>393</sup> Cicero, *Book 1 De Officiis*.

### 6.1.1.2 Strict liability and stigma

Strict liability is argued to be further justified on the basis that there is a low moral stigma attached to the minor crimes concerned. Thus, the apparent injustice of ignoring lack of moral culpability is less important. This is a strong line of reasoning on the face of it, for instance, for Simester, the dividing line between ‘unjustified/objectionable’ imposition of strict liability and ‘legitimate’ versions of the same is coterminous with the boundary between what he calls ‘stigmatic’ and ‘non-stigmatic’ crimes<sup>394</sup>. Simester argues that not all strict liability is wrong, only strict liability that leads to the morally blameless being convicted. In this analysis, parking contraventions (before they were de-criminalised in the UK) could be drafted as strict liability without criticism, but not an assault for example<sup>395</sup>. He further argues that it does not matter if such convictions are in a general sense unfair, as there is little or no effect on the way other people view the offender and thus little effect on their lives beyond the sanction. Furthermore, there can even be justification for strict liability in stigmatic crimes in limited circumstances, such as strict liability going to a non-material element. An example of this would be that the accused need not have contemplated the (old) requirement that a victim die within a year and a day to be guilty of murder<sup>396</sup>. Also, strict liability is viewed as acceptable in evaluative elements of an offence. That is, whether conduct is ‘dangerous’, ‘indecent’ or ‘obscene’ is a matter for a jury and it does not matter whether the accused felt themselves to have crossed that moral line<sup>397</sup>.

At common law, the fact that Parliament clearly decided that a crime should not require *mens rea* is definitive<sup>398</sup>. This is on the basis that during the various stages of the relevant Bill, both Houses will have *inter alia*, considered what effect the stigma of conviction would have on the accused. In a democracy that decision is supposed to be sacrosanct. This means that judges’ ‘...first duty is to consider the words of the Act; if they show a clear intention to create a [strict liability] offence, that is the end of the matter...’<sup>399</sup> One either has faith in Parliamentary democracy or one does not, and if Parliament is to be trusted on these matters then the collective

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<sup>394</sup> Simester (n 98) 21.

<sup>395</sup> *Ibid.* 22-23.

<sup>396</sup> *Ibid.* 42.

<sup>397</sup> *Ibid.* 43.

<sup>398</sup> Richard Card, *Card, Cross and Jones Criminal Law*, 20<sup>th</sup> Ed., (Oxford: OUP 2012) para 5.8.

<sup>399</sup> *Sweet v Parsley* [1970] AC132, [1969] 1 All ER 347 at 349-350.

decision that strict liability is appropriate should be respected. Thus, on that basis strict liability for low moral stigma crimes is acceptable.

Simester's evaluation is interesting and thorough, but there are issues to be taken with it. The position is broadly anti-strict liability, but with exceptions. The arguments do contain some key omissions however. Firstly, the clear divide between stigmatic and non-stigmatic crimes does not exist, it is fluid and opaque, not a straight and obvious line. Public safety campaigns have moved public opinion on some traffic offences from one side of that divide to the other for instance. Drink driving has moved from being just another traffic misdemeanour to a conviction which will alter the way the perpetrator is perceived, and will affect the likelihood of gaining or retaining gainful employment. Speeding is going the same way, with some fairly brutal imagery being used in public safety broadcasting. Furthermore, public censure can work in a more convoluted way than Simester allows for. A minor traffic infringement may not in itself greatly diminish a person's stature in the public eye, but consider the position of a person in the UK, having passed their driving test within the preceding two years. If such a driver is caught using a mobile device at the wheel from 1<sup>st</sup> March 2017, this will result in an automatic six penalty points which also therefore means a driving ban in reality. This is because the law now mandates that such an inexperienced driver must sit another driving test if six points or more are earned<sup>400</sup>. All this from one traffic violation, and yet the ban and limited employment prospects flowing from it will apply a stigma, even if the single use of a mobile phone while driving does not.

Stigma may also be contingent on other factors beyond the reach of the legal provision concerned and this may even be down to pure bad luck. A breach of the law may not lead to serious death, injury, or financial loss except in a tiny minority of cases. It is only in this small category that, with a catastrophic outcome from a combination of factors, stigma attaches. For example, prosecution for locking factory fire exits will not necessarily lead to more than passing public opprobrium unless there is actually a fire and loss of life. Thus, the stigma is entirely dependent on the circumstances. This is not the case in truly stigmatic crimes, there may be very different levels of moral culpability in any given range of serious assaults for instance, but it is rare for society to look behind the conviction itself before forming a judgment about the

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<sup>400</sup> S4 Road Traffic (New Drivers) Act 1995 and S 41D Road Traffic Act 1988.

perpetrator. There are exceptions, such as the first instance convictions for murder in the battered wives cases of *Thornton*<sup>401</sup> and *Ahluwalia*<sup>402</sup>. In general though, a person with a violent or other serious conviction of any sort will not be viewed any differently on the basis that they raised a defence which very nearly convinced the jury, but ultimately did not. It is mostly a binary situation, the person has a conviction or they do not, stigma attaches or it does not. The same is true of crimes on the indistinct boundary between stigmatic and non-stigmatic offences. It will not normally alter the perception of a drink drive conviction to assert that the driver was only just over the legal blood alcohol limit.

Consequent on the foregoing discussion, undue ease of prosecution is a problem even in non-stigmatic crimes when the resulting harm to the life of the perpetrator is so out of proportion to the wrongdoing. Also, fault-based liability is more appropriate when a breach might result in much social harm, such as multiple fatalities in a workplace, otherwise blind luck plays far too great a part in the justice process. For these collective reasons, it is not enough to simply assume that Parliament has taken the level of likely stigma into account when stipulating strict liability in statute.

Points made about justice being more efficient if in some circumstances *mens rea*, or its equivalent, need not be proved are cynical in the extreme. They suggest that it is more important to secure convictions than to secure convictions of the right people and that the occasional unjust conviction is acceptable ‘collateral damage’ in the fight against wrongdoing. The accepted general premise behind criminal law is that it is better not to convict than to convict the innocent,<sup>403</sup> but this principle seems to be ignored where strict liability crimes are concerned.

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<sup>401</sup> [1996] 1 WLR 1174

<sup>402</sup> (1993) 96 Cr App R 133

<sup>403</sup> ‘Better that ten guilty persons escape than that one innocent person suffer.’ Attr. Sir William Blackstone and Benjamin Franklin.

### 6.1.1.3 Strict liability and the theory of deterrence

Strict liability is also viewed as acceptable because it is an added deterrent. An activity may be highly deleterious to society, such as breaches of health and safety at work or failures to adhere to acceptable trading standards. In such instances, strict liability is said to be justified in that such behaviour is deterred. This is because of the ease with which prosecutions may be successfully brought without the need to prove *mens rea*<sup>404</sup>. Strict liability is argued to make for a more efficient criminal justice system, and it may cause rational actors to take more precautions<sup>405</sup>.

The deterrent argument is fundamentally flawed, however, as deterrence has a limited evidence base as a rationale for punishment<sup>406</sup>. It is human nature to assume, in most circumstances that the risk of detection is less than the possibility of benefit to be derived from committing the crime or the enterprise would not be embarked upon, an example of Bentham's 'Pleasure – Pain' dynamic at work<sup>407</sup>. Put another way, a significant proportion of people commit crimes on the assumption that they will not get caught, thus deterrence from sanctions is irrelevant to them at the point of making the decision to act in a deviant way.

Furthermore, taking a Kantian perspective, if we act in a moral fashion because it is the rational thing to do<sup>408</sup> then that is wholly undermined if the upholder of morality is the law and aspects of that law are irrational in that they convict the morally blameless. For Nagel, strict liability 'may have its legal uses but seems irrational as a moral position' and Simester concurs.<sup>409</sup>

### 6.1.1.4 Strict liability – a comparative view

Strict liability is a creature of the Anglo-American legal tradition, although not without challenge. For example, the Supreme Court of Canada, interpreting the Canadian Charter of Fundamental Freedoms (1982), held that if a conviction could result in imprisonment and if the accused has diligently, though unsuccessfully, attempted to avoid the act or omission prohibited

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<sup>404</sup> Simester (n 98) 28.

<sup>405</sup> *Ibid.* 33.

<sup>406</sup> Newburn (n 60) 531.

<sup>407</sup> Jeremy Bentham, J. *An Introduction to the Principles of Morals and Legislation*, (New York: Hafner Press 1973) 66.

<sup>408</sup> *Grundlegung zur Metaphysik der Sitten* (Groundwork for the Metaphysics of Morals) (1785).

<sup>409</sup> 'Moral Luck', in *Mortal Questions* (Cambridge 1979), p31 cited in Simester (n 98) 49.

by law, then any conviction would be a breach of human rights<sup>410</sup>. For McCutcheon, this produced a limited form of ‘due diligence’ defence (a concept to which this thesis will return) in strict liability cases<sup>411</sup>. However, this is not a path that English courts have followed as yet. Strict liability is virtually unknown in civil legal systems although it is not quite true to say that there is no trace at all; for Spencer and Pedin, the position in continental jurisdictions is more complex than that<sup>412</sup>. They do conclude however that both French and German criminal law reject strict liability in principle and that there are ‘many fewer instances of ‘strict’ and ‘constructive’ criminal liability to be found on the continent than in England’<sup>413</sup>. It is true to say that this has, in part, resulted from a preference for administrative proceedings in many European states, particularly with regard to environmental strict liability offences. In Belgium, the *Milieuhandhavingsdecreet* 2008<sup>414</sup>, gives the enforcement authorities the ability to impose administrative fines without the matter being treated as criminal. For Faure and Svatikova, there are several advantages to this approach. Administrative sanctioning might be preferred in some instances if the risk of harm is low. Prevention through licensing and monitoring is also to be preferred to sanctions after detection, therefore after the harm is done. Further, breaches may be a matter of lack of information, which can be addressed by better communication from the licensing authorities. Finally, because of a lower standard of proof in administrative law, it is likely that more violations will result in punishment and, closely related to this, a presumption that proceedings will be less costly<sup>415</sup>. The fact remains though that much of the argument in this thesis is around the disproportionate harm that stigma does to the offender. Further, that it is not so easy to categorise crimes into ‘high’ or ‘low’ moral stigma categories. The absence of strict liability offences from European criminal law courts and textbooks does not mean there are any less offences on the continent and elsewhere, such as South America. It does mean however that civil law countries do not, as a rule, impose criminal liability without proof of fault. This is

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<sup>410</sup> *B.C. Motor Vehicle Reference* Supreme Court [1985]

<sup>411</sup> Paul McCutcheon, ‘Sports discipline, natural justice and strict liability’ (1999) *Anglo-American Law Review* 28(1), 37-72, p61.

<sup>412</sup> John Spencer and Antje Pedain, ‘Approaches to Strict and Constructive Liability in Continental Criminal Law’ in Simester (n 98) 237 – 283.

<sup>413</sup> *Ibid.* 281.

<sup>414</sup> Flemish Environmental Enforcement Decree 2008.

<sup>415</sup> Michael Faure and Katarina Svatikova, ‘Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe’ (2012), *Journal of Environmental Law*, Volume 24, Issue 2, 1 July 2012, 253–286, 255-258.

entirely in keeping with the main thrust of this thesis. Furthermore, the fact that major jurisdictions of Roman-Germanic derivation can function perfectly efficiently having rejected the principle of strict liability in criminal law, significantly weakens the case that it is justified in common law legal systems. If such respected legal traditions with an august history can manage perfectly well without the enormous reliance on strict liability crimes found in common law legal frameworks, then this does beg the question of why strict liability is so popular in Anglo-American legal systems, a point to which this research will return.

#### **6.1.1.5 The fate of English criminal law reverse burdens in ECHR jurisprudence**

Reverse burdens of proof are also sometimes justified on similar grounds to strict liability, i.e. that the defendant is in the best position to prove a given point, especially in an affirmative defence such as insanity or self-defence. The point is made that the prosecution would be placed under too great a difficulty should it be required to prove sanity, or prove the lack of proportionality of an attack on a perceived aggressor. This has led to Parliament enacting reverse burdens in some statutes, others can be implied. However, these have not been immune to judicial challenge as this section will analyse. The courts have been keen to preserve the principle of ‘equality of arms’ in an adversarial hearing, such that no greater burden is placed on the defendant than is absolutely necessary. This is a particularly pertinent point for this thesis because the research has repeatedly underlined the analogies that can be made between common law criminal legal systems and sports discipline. In this instance, the modified version of strict liability, termed ‘presumed fault’ now found in the WADA Code and its derivatives, requires the athlete to prove to a specific standard that they acted without negligence.

Purely evidential burdens placed upon the defendant have been found to be in accordance with the principles of Article 6(2) ECHR<sup>416</sup>. However, the picture is much less clear with full persuasive burdens placed upon a defendant such as in misuse of drugs cases and drink driving charges. In summary, in English cases much appears to turn on the potential consequences for

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<sup>416</sup> *A-G's Ref (No 1 of 2004) R v Edwards and other appeals* [2004] All ER (D) 318, per Lord Woolf.



the defendant<sup>417</sup>, a position also taken by the ECtHR<sup>418</sup>. The conjoined appeals in *Sheldrake v DPP; AG's Ref (No 4 of 2002)* [2005] 1 AC 264 are key to establishing the current legal position on the compatibility of full reverse burdens with convention principles.

In *Sheldrake*, the charge was one of being drunk in charge of a motor vehicle contrary to s5(2) Road Traffic Act 1998 (RTA). There is a burden placed upon the defendant to prove that there was no likelihood of him driving the motor vehicle, upon successful discharge of which he must be acquitted. In this case, the then House of Lords ruled unanimously that there was no need to 'read down' the provision and that the imposition of the burden was justifiable. In *AG's Ref (No 4 of 2002)* however, a case concerning charges of 'belonging or professing to belong to a proscribed organisation' under s11(1) Terrorism Act 2000 the House of Lords reached a different view. There is a statutory defence to this charge in s11(2):

'It is a defence for a person charged with an offence under subsection (1) to prove

(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and

(b) that he has not taken part in the activities of the organisation at any time while it was proscribed.'

Here the finding was that the provision should be interpreted to require the accused to bear an evidential burden of proof only<sup>419</sup>. This is to give effect to ECtHR jurisprudence that 'the means employed have to be reasonably proportionate to the legitimate aim to be achieved'<sup>420</sup> when considering burdens of proof and Art. 6(2). The criteria employed by English courts when trying to decide whether a full reverse burden of proof is compatible with Article 6(2) is to assess the severity of the consequences for the accused. Full reverse burdens will not be compatible if the consequence of conviction is substantial, thus the 'equality of arms' principle only weighs more heavily in the decision making when there is likely to be the most moral opprobrium and punitive consequences under law.

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<sup>417</sup> *Ibid.*

<sup>418</sup> *Salabiaku v France* (1988) 13 EHRR 379 see also *Janosevic v Sweden* (2004) 38 EHRR.

<sup>419</sup> *Dennis* (n 110) 473-474.

<sup>420</sup> *Janosevic v Sweden* (2004) 38 EHRR 473.

In due course, this research will prove that convention rights are becoming integral to even private law claims which would include a legal challenge to an adverse disciplinary finding. Thus, the preceding discussion not only critiques strict liability *per se*, but also provides arguments that could actually be employed to appeal an adverse arbitral award in the future based on an alleged breach of fundamental rights by the SGB concerned. It is, after all, difficult to overestimate the severity of the consequences of a doping or misuse of medication ‘conviction’ on any professional athlete and no less so a professional equestrian, jockey, or trainer. These consequences could range from a loss of face through to loss of career and huge pecuniary loss from cancelled sponsorship and endorsement contracts.

### **6.1.2 Strict liability/presumed fault in equine cases**

For McCutcheon, strict liability in sport is justified because of the ‘...need for the efficient administration of the disciplinary function coupled with a belief that it would pose inordinate difficulties to prove knowledge or fault on the part of the offender...’<sup>421</sup>. There is, however, more to the pro strict liability argument than that. There are also significant issues specific to horse sport which can be used to challenge this position, and these competing arguments shall be explored. It is important that the arguments specific to sport should be considered in the light of the discourse on strict liability in criminal law, discussed earlier, as there are concepts common to both. However, the arguments in this *equine sport-centric* discussion specifically concern the contractual argument, the scientific position, practicality/resources, the stigma issue, health, and the defence of sport and sporting ideals.

#### **6.1.2.1 The contractual argument**

SGBs and IFs, such as the BHA and FEI, are autonomous sporting structures and if they wish to include strict liability provisions in their regulations that is their right. On this basis, strict liability is not objectionable as the athlete has accepted it by participating in the sport. McCutcheon argues, ‘if you can’t stand the heat get out of the kitchen’<sup>422</sup>, paraphrasing Cory J

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<sup>421</sup> McCutcheon (n 411) 43.

<sup>422</sup> *Ibid.* 67-68.

justifying strict liability in licensing law<sup>423</sup>. Cory J further ruled that provided one is likely to be alert to the possibility of regulation, then strict liability is also not likely to be a breach of human rights<sup>424</sup>. In terms of the UK courts, despite doubts expressed in *Modahl v British Athletics Federation* (No 2) [2002] 1 WLR 1192, relationships between sports personalities, their clubs, and indeed governing bodies derive primarily from the law of contract, either the contracts the athletes enter into as members of these bodies, or as part of a wider ‘contractual nexus’ created by the practicalities of the way sporting events are organised and held. Sometimes the contractual relationship can exist by conduct. In *Davis v Carew-Pole* [1956] 1 WLR 833 it was the fact that Davis attended the disciplinary hearing of the National Hunt Committee at all that amounted to the required conduct. On this basis, the simple solution to not being bound by strict liability is to choose another career. Harsh, but true.

There are three main issues that can be taken with this approach. Firstly, the fact that a body has the right to create its own rules does not allow it to act in a completely arbitrary way, at least not without challenge. Notwithstanding Cory J’s views, this research has shown that there is now a real possibility of review of sporting regulation by the courts, including on a human rights basis (*Infra*). If the regulations do not accord with notions of justice, then they cannot stand long term and it does sport little credit to simply insist ‘my house, my rules’. Even in cases where a direct legal challenge to unjust rules is not used, public and economic pressure, such as being dropped from international competition, can be uncomfortable and ultimately decisive<sup>425</sup>.

Secondly, it is very important for those governed to have confidence in the regulation of their sport. For Straubel, ‘...if the system wrongfully punishes or harshly treats athletes it will lose the support of those it governs...’<sup>426</sup> There is always the argument that an athlete can campaign to

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<sup>423</sup> *R v Wholesale Travel Group Inc* (1991) 84 DLR(4<sup>th</sup>) 161, 213-214.

<sup>424</sup> See *Lambert v California* (1957) 355 US 225, strict liability was unconstitutional in this instance as at the time it was considered there was no reason to be alert to the fact that being an ex-sex offender would be the subject of regulation.

<sup>425</sup> See Alexandra Topping, ‘Muirfield golf club to allow women to join for the first time’, (London: Guardian Online 17<sup>th</sup> March 2017), available at <https://www.theguardian.com/sport/2017/mar/14/muirfield-golf-club-to-allow-women-to-join-for-the-first-time> (accessed on 12/09/17).

<sup>426</sup> Michael Straubel, ‘Doping Due Process: A Critique of the Doping Control Process in International Sport’ (2002), 106 *Dick. L. REV* 523, 569.

change rules that are unfair, using the democratic process within the structure of the SGB or IF. It is very difficult to be an ‘activist athlete’ and still compete however. There are of course obvious exceptions, such as the ‘Black Power’ salute at the 1968 Mexico games and the narrowly avoided strikes by footballers in the winter of 2001 which took place over broadcasting revenue and jockeys in 2011 over the whip rules. Other than these, there are few instances of athletes taking on the establishment. Those that do are usually forced to because they face a tribunal, for instance in the *Chagnaud v FINA* and *Foschi v FINA* cases<sup>427</sup>. Sports, like society, have a huge imbalance of power between establishment and participant. This, and other political factors militating against there being a forceful voice for change at the level of the competitor, is a theme that this research will return to later.

Thirdly the saying ‘if it ain’t broke don’t fix it’ is pertinent. The other side of that coin is that if it is ‘broke’ then strenuous efforts are necessary to ‘fix’ it. The SGB or IF is in the best position to carry out the necessary amendments, and it is unsatisfactory to be inert in the face of obvious problems. Equine sport is in a state of crisis, as this research has shown, and the current drafting of the rules, particularly those around strict liability is not satisfactory. This is because of the recurring theme of this research: The unique nature of the team with its *human* and *non-human* athlete members.

#### **6.1.2.2 The science**

The presumption that the presence at a recordable level of a substance in the body of an athlete is performance enhancing/inhibiting or harmful to welfare is based on scientific evidence. There is no need here to consider recreational drugs as we are concerned with equines. Once an *adverse analytical finding* is made then, based on the prevailing scientific knowledge, there is a reason for that animal and or associated human to face disqualification. Further, they may face a period of ineligibility. For McCutcheon, in *Willander v Tobin*<sup>428</sup>, in following the reasoning in *Gasser v Stinson*<sup>429</sup>, there was some concern from the Court of Appeal about the onus of proof shifting to

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<sup>427</sup> CAS 95/141, 22/04/96, *Chagnaud v FINA* and CAS 96/156, 6/10/97, *Jessica Foschi v FINA*, See Soek (n 104) 153 -156 where he notes the defence in both was a ‘full frontal’ attack on the principle of strict liability.

<sup>428</sup> *Willander v Tobin*, The Times, April 8, 1996 (CA March 26, 1996).

<sup>429</sup> *Gasser v. Stinson*, QBD, unreported, 15 June 1988

the athlete. Ultimately though, the court felt that it was ‘...reasonable in the context of a code of this kind...’ to expect the athlete to rebut the *prima facie* scientific case. In other words, in the absence of a query over the scientific processing or chain of custody<sup>430</sup>, the scientific evidence should be accepted without question.

In terms of equestrianism, the recommendations for substances and practices to be prohibited come from a panel of scientific experts and is updated annually to take account of advances in science. The foreword to the FEI Veterinary Regulations (VRs) states: ‘The FEI Equine Prohibited Substances List (EPSL) lists all Prohibited Substances, categorising them as either Banned Substances or Controlled Medication Substances, and is incorporated in the EADCMRs. The EPSL is revised by a group of experts (List Group) who propose changes to the FEI Bureau once a year’<sup>431</sup>. This is reassuring as science is moving forward at an exponential rate and a list of banned substances could very quickly get out of date. The ethos is indeed strict, in the lay sense of the word, and Soek maintains that it covers substances that ‘might’ affect performance or welfare, even if they ultimately do not. For Soek, ‘the preamble to the IOC Medical Code spoke of certain substances and methods intended to enhance and/or having the effect of enhancing athletic performance. From this wording, it emerges that of certain substances and methods it does not need to be scientifically proven that they boost athletic performance. It is sufficient that these substances and methods are intended to create this effect’<sup>432</sup>. He goes on to cite the (old) Veterinary Regulations of the FEI and the IBU Anti-doping, Blood Test and Gender Verification Rules as examples containing similar wording. The net result of this is that a kind of ‘law of attempts’ is created. This is such that, as in criminal law, an attempt to do the forbidden act, even though it is not possible for the intended consequence to materialise in fact<sup>433</sup>, will result in liability. It is contended that all of this ought to act as a significant deterrent to doping in equine sport as well as providing a level of certainty.

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<sup>430</sup> See *Modahl v British Athletic Federation Ltd* (1997) CA Unreported.

<sup>431</sup> FEI 2018 Veterinary Regulations, p6, available at: <http://inside.fei.org/system/files/FINAL%202018%20proposed%20Veterinary%20Regulations.pdf> (accessed on 13/09/17).

<sup>432</sup> Soek (n 104) 16.

<sup>433</sup> See *R v Shivpuri* [1986] UKHL 2, where a confession to drug smuggling was sufficient for a conviction, even though the substance concerned transpired to be a legal herb.

On a journey through the detail of the awards made in sport cases, it is true to say, however, that the scientific evidence is at times itself disputed. For instance, later in this chapter, the *Equi-blok* cases from the 2008 Olympics will be considered. A derivative of chilli peppers, used in ‘*Equi-Block*’ muscle relaxing liniment had only recently been added to the prohibited substances the FEI tested for. CAS upheld the decision to ban an Irish rider and three others, but acknowledged the disputed nature of the scientific evidence and suggested the FEI look again at their regulations<sup>434</sup>. In human cases, for Foschi, ‘[o]n the one hand, WADA must define the illegal level; yet, on the other hand scientists have conducted studies to show that humans (especially elite athletes) can naturally produce levels [of testosterone in this case,] higher than those provided for in the Code. If true, the imperfect science behind these ratios is putting athletes at risk of false positive test results’<sup>435</sup>.

It is outside the scope of this research to look behind the scientific evidence, but there are cases where it is difficult to understand why *de minimis non curat lex* cannot be invoked. In the case of *Estimate* already discussed and *Al Eid* and *Sharbatly*, the subject of this case study, the traces concerned were so small it seems to defy credulity that there was any appreciable effect on the horses. Disqualification may be inevitable (see later) and a ban was awarded in the latter case, however, a question must be asked as to if, when the amounts are so low, the question of whether the humans involved are cheats and/or animal abusers has got rather lost. Further, in 2017 alone, a positive test for *Minoxidil* was most likely caused by human hairspray used by the horse’s owner’s husband, thought to have transferred from his scalp to his fingers before he fed the horse by hand<sup>436</sup>. Later, a race horse tested positive for a metabolite of the human pain killer *Tramadol* after a stable lad taking the substance urinated in his stable<sup>437</sup>. In both cases, there was disqualification from the event concerned, but no further penalty other than provisional suspension pending the hearings. Nevertheless, these are failed dope tests which will leave a

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<sup>434</sup> Wendt (n 129) 71.

<sup>435</sup> Foschi, (n 289) 472.

<sup>436</sup> Eleanor Jones, ‘Owner’s hairspray causes showjumper’s positive dope test’, (Horse and Hound Online, 3 July, 2017), available at: <http://www.horseandhound.co.uk/news/owners-hairspray-causes-showjumpers-positive-dope-test-625148> (accessed on 13/09/17).

<sup>437</sup> Eleanor Jones, ‘Wee warning: horse fails dope test after stable lad caught short’, (Horse and Hound Online, 8 August 2017), available at: <http://www.horseandhound.co.uk/news/wee-warning-horse-fails-dope-test-stable-lad-caught-short-628590> (accessed on 13/09/17).

moral stain. Furthermore, the parties had to endure the emotional trauma of disciplinary hearings and the SGBs concerned had to enter into expensive proceedings. Taking a step back from these matters it is very hard to see that in any of this, the end goal of protecting integrity of sport or animal welfare were appreciably served.

### 6.1.2.3 Practicality and resources

The broad base of these concerns is the same as that advanced for criminal law, discussed earlier. The need for strict liability in doping cases is sometimes defended by sportsmen and women themselves, but most fiercely by those in charge of it. For instance according to Coe, ‘we cannot, without blinding reason and cause, move one millimetre from strict liability – if we do, the battle to save sport is lost’<sup>438</sup>. For McCutcheon, Scott J in *Gasser v Stinson* was influenced by pragmatic issues such as the effect of enforcement if a defence of moral influence was allowed. This would be such that ‘...the floodgates would be opened and the IAAF’s attempts to prevent drug taking by athletes would be rendered futile’<sup>439</sup>. For Gardiner, according to WADA, ‘...the code as a whole, strikes an appropriate balance between the needs of anti-doping and the fair treatment of athletes’<sup>440</sup>, and the strict liability rule is appropriate. Scott J’s words are powerful support here again, ‘...[s]uppose an athlete gives evidence that he or she did not take the drug knowingly, and that it must therefore be inferred that the drug was digested unknowingly. How is the IAAF to deal with such an explanation? How can credibility be tested?’<sup>441</sup> There would indeed be a significant mountain to climb by the SGB, in terms of resources and finances, to take on such a claim. Furthermore, the sums available to SGBs are finite and often under extreme strain. To be clear, the discussion here is about tackling the issue of fault at the *liability* stage of proceedings. The issue of fault does feature in the *sanctioning* phase of disciplinary proceedings. In *Quigley*, CAS stated, ‘...it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping’<sup>442</sup>. CAS uses similar reasoning to justify reversing burdens in doping cases, the

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<sup>438</sup> Coe (n 58). See also Houben (n 58).

<sup>439</sup> McCutcheon (n 411) 45.

<sup>440</sup> Gardiner (n 80) 375.

<sup>441</sup> *Ibid.* 374-5.

<sup>442</sup> CAS 94/129 (23/05/95) *USA Shooting & Quigley v UIT*, Ground 14.

‘modified strict liability’ principle: ‘In doping cases, it would be practically impossible for a sports federation to prove how a banned substance arrived in an athlete’s body or that the athlete had knowingly ingested the banned substance. Any such requirement would be the end of any meaningful fight against doping’<sup>443</sup>. There is no doubting the effort required to establish the presence or absence of fault in doping and other integrity cases based on strict liability therefore.

O’Leary observes, however, that there is a fundamental right of the opportunity to prove a lack of fault<sup>444</sup> and to deny it is not in keeping with the legal maxim *nulla poena sine culpa*<sup>445</sup>. In addition, the assumption that the body of the athlete concerned is a human one runs right through this thread of argument. It is often no easier for the *rider or trainer* etc. to prove how a banned substance arrived in the body of the horse. Both sides had to resort to conjecture in, for example *Mullins*, *Al Eid and Sharbatly*, and the *Estimate* case. In fact, the argument that fundamental rights can be set aside on practicality grounds in sporting cases is actually even weaker than the equivalent put forward to justify strict liability in criminal law. In doping cases, the fault element has to be considered in the sanctioning phase and, in contrast to a sentencing hearing in a criminal court, there is a significant standard of proof to be met there per Article 3.1 WADA Code. Consequently, it is dismissive to imply that attaching the fault arguments to the liability stage would involve any more nor less resources, time, and expense than they currently do when pertaining to the sanctioning phase. By way of example the award in the case to be studied later in this section, *Sharbatly* and *Al Eid*, is thirty-two pages long (See Appendix 1) and involves complex arguments on interpretation of rules and consideration of expert evidence to determine the *sanction*. The FEI would have had no more nor less difficulty in fighting that case if those arguments had been attached to the *liability* phase.

#### **6.1.2.4 The moral stain of cheating**

The effect of the stigma attached to riders, owners and trainers in specific equine cases and the quality of the justice meted out in those is discussed at some length later. In particular, the

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<sup>443</sup> CAS 96/156, 6/10/1997 *Foschi v Fina*, Ground 12.2

<sup>444</sup> Soek (n 104) 151.

<sup>445</sup> Part of the argument used by Chagnaud in CAS 95/141, 22/04/96, *Chagnaud v Fina*, Ground 13.



discussion regarding the Irish and German national federations' response to the 2008 Games equestrian 'scandal' is pertinent. Here, the focus is therefore on sport more generally.

In common with criminal law<sup>446</sup>, strict liability in sport is justified as the offences carry a relatively low moral stigma. That is to say, an award which acknowledges the lack of fault in the sanction, such as a disqualification but not a subsequent ban, carries no appreciable moral stigma. An award which included a significant period of ineligibility would, of course, carry a level of public opprobrium with it. That said, the moral stain even from a lengthy ban can be argued to be really only limited to sport. There would be little if any effect on an athlete's employment prospects or their general standing in society, outside sport in the way that a criminal conviction might have. In this respect also, even wrongful convictions for doping are of relatively low consequence in the greater scheme of things.

This argument rather minimises the emotional and financial impact of losing, or even suspending an athletic career however. Anderson notes the 'reputational, financial and psychological costs of being rendered a cheat'<sup>447</sup> which are not much ameliorated by the modification to the strict liability principle adopted by WADA. In fact, no athlete can afford to be even vaguely linked to doping allegations and sometimes the indirect allegations are the toughest to ward off. The central problem is that *any* connection between a sportsperson and a doping allegation results in a stigma. For example, a trainer with connections to British Olympian Mo Farah faced doping accusations in 2015. This forced Farah to disavow any wrongdoing, even though there was no direct allegation against him<sup>448</sup>. Similarly, there was no direct accusation laid against marathon runner Paula Radcliffe, but she was forced to publicly defend her name. This was because it was intimated in a Parliamentary Select Committee hearing into doping allegations, in September

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<sup>446</sup> See for example Card (n 398) Chapter 5.

<sup>447</sup> Anderson (n 102) 125.

<sup>448</sup> 'Mo Farah 'wants answers' over Alberto Salazar doping claims', (BBC Sport Online 6 June 2015), available at <http://www.bbc.co.uk/sport/0/athletics/33034350> (accessed on 31/10/15).

2015, that a ‘British winner of the London Marathon was ‘potentially’ implicated’<sup>449</sup>. Foschi, has critiqued the well-known example of an athlete who falls sick on the eve of competition used by CAS in *Quigley*<sup>450</sup>. For Foschi, the analogy of the disappointment and financial loss associated with illness ‘...is simply not credible...’ and ‘...does not hold a candle to the effects of being banned from one’s sport for two years through no fault of one’s own’<sup>451</sup>. She goes further, stating; ‘[n]ot only do athletes who accidentally ingest a banned substance suffer the loss of a longer period of lost competition, they suffer the much greater harms to their reputation, loss of contracts or endorsements, and a mark on their record that will remain with them for the rest of their careers and possibly even beyond’<sup>452</sup>.

It is clear then that even the association with poor integrity arising from being involved in proceedings, even with no ban awarded, should not be dismissed. It is possible for a ban to arise from an accidental ingestion, such as in *Al Eid and Sharbatly* (see later), and CAS’ own words can be turned against them. In *Quigley*, the panel found that ‘[t]he vicissitudes of competition, like those of life generally, may create types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair’<sup>453</sup>. As discussed above, the hypothetical example of an athlete getting food poisoning the night before a competition was given as an example of such an accidental detriment. The point is, the unintentional, non-negligent ingestion of a PED or substance adverse to the welfare of the athlete, of whatever species, *is* such an accident. CAS says the law cannot repair such vicissitudes, but in sanctioning athletes it is attempting to do just that. Given all of this, it is further apparent that the argument for strict liability on the basis that no, or little, moral stigma is involved in sporting cases is not insurmountable.

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<sup>449</sup> Owen Gibsen, ‘Paula Radcliffe denies ‘cheating in any form’ after allusions in parliament’, (London: Guardian Online 8 September 2015) available at <http://www.theguardian.com/sport/2015/sep/08/paula-radcliffe-denies-cheating-parliamentary-committee> (accessed on 31/10/15).

<sup>450</sup> CAS 94/129 (23/05/95) *USA Shooting & Quigley v UIT*, Ground 14.

<sup>451</sup> Foschi (n 289) 475.

<sup>452</sup> *Ibid.* 475-476.

<sup>453</sup> CAS 94/129 (23/05/95) *USA Shooting & Quigley v UIT*, Ground 14.

### 6.1.2.5 Health

Strict liability in sport cases is defended by WADA and commentators as important because of the seriousness of the potential impact on the health of athletes from drug taking. Soek explains the measures in place as a ‘deterrent’ and notes that ‘[o]f all the arguments against doping that have been put forward, the argument that the use of doping substances endangers the user’s health is used the most’<sup>454</sup>. Soek cites the IOC Charter Preamble to support this, but now the words of the Preamble to the Olympic Movement Medical Code echo this ethos in promoting the ‘...principle objective of protecting the health of athletes’<sup>455</sup>. For Gardiner, this paternalistic approach is difficult to justify, unless in the case of children and other vulnerable athletes, because of the presumption that an adult can make their own informed choices<sup>456</sup>. These are, of course, the focus of this research as horses are potentially the most vulnerable of athletes, possessing no autonomy at all. The horse is thus not accountable so for the avoidance of doubt, there is no basis for holding the horse liable<sup>457</sup>. Regan uses the term ‘moral patient’ to distinguish the animal from the human ‘moral agent’. For Regan, ‘moral patients lack the prerequisites that would enable them to control their own behaviour in ways that would make them morally accountable for what they do’<sup>458</sup>. In the *Al Eid* and *Sharbatly* case it was stated:

‘A central and distinctive feature of equestrian sport is that it involves a partnership between two types of athlete, one human and one equine. One of those partners is unable to speak for itself, and therefore the FEI has assumed responsibility for speaking on its behalf, by taking every necessary step to ensure that, in every aspect of the sport, the welfare of the horse is paramount’<sup>459</sup>.

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<sup>454</sup> Soek (n 104) 13.

<sup>455</sup> Olympic Movement Medical Code, Preamble, p3, available at:

<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Medical-and-Scientific-Commission/Olympic-Movement-Medical-Code-31-03-2016.pdf> (accessed on 14/09/17).

<sup>456</sup> Gardiner (n 80) 383.

<sup>457</sup> Merritt (n 127) 203.

<sup>458</sup> Tom Regan, *The Case for Animal Rights* in Susan Armstrong and Richard Botzler (eds.) *The Animal Ethics Reader*, (London: Routledge 2003) 17.

<sup>459</sup> CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale at para 6.24 (see also Appendix 1).

It is very difficult to counter this argument as the welfare of the horse is of utmost importance in the regulations of all the major SGBs, as it should be. The only suggestion would be that again, there must be situations where a *de minimis* approach ought to have primacy and that does not always seem to be the case as previously discussed. This research will propose alternative ways of drafting regulations which would address this problem however.

#### **6.1.2.6 The protection of sport and sporting ideals**

The protection of sport, as opposed to the ideals of sport, often has economic undertones. Lack of faith in the integrity of a given sport can have significant repercussions in lost public interest and, thus, revenue. In Australia, in *Harper v Racing Penalties Appeals Tribunal* Anderson and Owen, J noted that the ‘...very survival of the industry as well as substantial government revenue would seem to depend on encouraging people to bet on horse racing...[i]t may well be anticipated that unless racing is to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect of the administration of drugs to horses...’<sup>460</sup> Thus, strict liability protects both fairness for its own sake and related economic interests.

The ‘Corinthian Ideals’ of sporting fair play are summed up in the Olympic Charter:

‘Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles’<sup>461</sup>.

CAS cites the ‘high objectives and practical necessities of the fight against doping’<sup>462</sup> as a further factor justifying strict liability, and the BHA Appeal Board has said words to the effect of ‘if

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<sup>460</sup> *Harper v Racing Penalties Appeals Tribunal* (1995) 12 WAR 337, 347.

<sup>461</sup> Olympic Charter 2015, p13, available at: [https://stillmed.olympic.org/Documents/olympic\\_charter\\_en.pdf](https://stillmed.olympic.org/Documents/olympic_charter_en.pdf) (accessed on 14/09/17).

<sup>462</sup> CAS 94/129 (23/05/95) *USA Shooting & Quigley v UIT*, Ground 16.

strict liability is good enough for CAS it's good enough for us'<sup>463</sup>. These high objectives include the notion that the athlete, of whatever species, who has an illegal substance in their system, even if unknowingly, cannot escape without sanction or there would be a resulting unfairness to the remaining 'clean' athletes, the 'collective'<sup>464</sup>. This is the 'laudable policy objective' referred to in *Quigley*<sup>465</sup>. CAS went on to dismiss the fact that this created unfairness on individuals as 'life in general is not fair'<sup>466</sup> and sport is no different. CAS added the high objective of 'sporting fairness' in further justifying strict liability in *Chagnaud v FINA*<sup>467</sup>. In this case CAS said that a competitor with a banned substance in their body should be disqualified from the competition in question because 'it would indeed be shocking to include in the ranking an athlete who had not competed using the same means as his opponents, for whatever reasons'. This is indeed a strong argument for strict liability rules for disqualification from the event in question at least, subject to the *de minimis* points already raised.

There are commentators, however, that question the very notion of the 'level playing field' as a basis for anti-doping regulation. Anderson notes several examples of natural, or at least pre-existing or tolerated unfairness. He suggests that PEDs sometimes do no more than *level* that very 'playing field'. He includes examples of a swimmer with size seventeen feet and cyclists with abnormally large hearts and lungs<sup>468</sup>. The swimmer has the accidental genetic advantage that his feet are effectively 'flippers'; the athlete who uses a perfectly legal barometric pressure tent, which is a non-accidental event and has the same effect as taking EPO, a banned substance, yet faces no sanction despite its enhancing effect. In like vein, Gardiner suggests that an athlete who dopes is not necessarily cheating, but 'taking on the sport itself'<sup>469</sup>.

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<sup>463</sup> *Mullins* (20/08/04) BHA Disciplinary Appeal Hearings, available at <http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/disciplinary/?result=535a2fbab33ebfaa5320e9b2> (accessed on 04/06/15).

<sup>464</sup> Soek (n 104) 150.

<sup>465</sup> *Ibid.* 149.

<sup>466</sup> *Ibid.*

<sup>467</sup> CAS 95/141, 22/04/96, *Chagnaud v Fina*, Ground 15.

<sup>468</sup> Anderson (n 102) 163.

<sup>469</sup> Gardiner (n 80) 383.

Examples of such tolerated advantages arise from time to time in equine sport as well. The Australian racehorse *Black Caviar* is said to owe much of his success to an abnormally large heart and lungs, and the era of the cloned horse athlete has begun. Consider for instance the emergence of cloned polo ponies with superior attributes to the donor animal, the arrival of at least one cloned show jumper and the possibility of a joint South Korean-Chinese cloning ‘factory’ in Tianjin<sup>470</sup>. At no point has a debate even begun as to whether these developments are in keeping with the ‘Corinthian Ideals’ at all. Later in this thesis, there will follow a discussion about quite radical alternatives to drafting sport regulation based on principles rather than a doctrinaire application of the literal meaning in sports regulations. Such an approach would at least get to the central question of whether the ‘accused’ is treating an animal badly and/or a cheat.

#### **6.1.2.7 Differentiating between a ban and disqualification**

It is important to differentiate between disqualification from the competition concerned and bans from subsequent competition for the sake of clarity. This is not least because arguments advanced by commentators sometimes conflate the two as if they are the same thing. Taking Foschi’s work for instance, she notes, ‘[n]ot only do athletes who accidentally ingest a banned substance suffer the loss of a longer period of lost competition, they suffer the much greater harms to their reputation, loss of contracts [and] endorsements...<sup>471</sup>’. This does not make it clear whether she is objecting to strict liability in respect of the disqualification which would affect reputation and possibly sponsorship, or in respect of a ban which would additionally mean lost competition opportunities. A disqualification and/or a ban are also the two outcomes from an *adverse analytical finding* from a horse’s sample. It is necessary to investigate whether strict liability is any more or less acceptable in either case, or indeed whether both are a *de facto* sanction and therefore the same arguments apply to both.

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<sup>470</sup> See Gareth Davies, ‘Cloning in polo has arrived and set to be talk of the town in Argentine season’, (London: Daily Telegraph Online, 21 October 2016) available at: <http://www.telegraph.co.uk/polo/2016/10/21/cloning-in-polo-has-arrived-and-set-to-be-talk-of-the-town-in-ar/> (accessed on 18/07/17), Cuckson (n 384) and Connor (n 385).

<sup>471</sup> Foschi (n 289) 475-476.

### 6.1.2.7.1 Disqualification

Once an adverse analytical finding has been made, the person responsible for the horse faces disqualification. As was held in *Chagnaud*:

‘...once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt....’<sup>472</sup>

According to Soek, additional to the ethical question, the need for CAS and other tribunals to take a strict liability approach here is also driven by ‘the desire to rid [the SGBs] of their evidentiary problems’<sup>473</sup>. In terms of disqualification, that line of reasoning has more credibility than it does with respect to subsequent ineligibility. This is because there is admittedly *less* likelihood of a moral stain attached to a disqualification only, although there is some risk here. Therefore, subject again to the *de minimis* arguments advanced in these sections, it would indeed be difficult to justify an athlete winning with an unfair advantage, even if accidentally imbibed. On that basis, if the amount of morphine concerned was high enough from traces of poppy seed to have a measurable effect, it was quite right to disqualify *Estimate* and for The Queen to forfeit her winnings. This does take the argument back to Anderson’s points about the lack of a level playing field in sport though, and his questions about the very basis or considering doping as automatically unfair in sport. Gardiner also points out that allowing PEDs in sport is not the same thing, even in principle, as allowing ‘...Usain Bolt to be beaten in an Olympic 100 metres final by a competitor riding a horse...’<sup>474</sup>. He notes that there is already a lack of uniformity in equipment in sport; shoes, boots, racquets, and bats can all differ and enhance performance in doing so. Finally, he points out that the clue is in the name, the drugs are ‘performance enhancing’ and he suggests this can mean allowing the athlete to reach their potential rather than adding an extrinsic skill or ability.

None of this has any impact on the horse welfare points, however. The encouragement to conform to acceptable animal welfare principles that strict liability provides has already been

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<sup>472</sup> CAS 95/141, 22/04/96, *Chagnaud v FINA*, Ground 15.

<sup>473</sup> Soek (n 104) 151.

<sup>474</sup> Gardiner (n 80) 383.

acknowledged in this research. Therefore, an animal with a harmful substance in its body should be disqualified from that event for that reason alone. There is therefore no benefit to be gained in administering that substance to the horse. Unfortunately, this means that very small amounts ingested accidentally will be caught by this, and it is important that the new style of regulations, suggested later in this thesis, are drafted to take account of this.

#### **6.1.2.7.2 Ineligibility**

The second adverse outcome that an athlete may face is ineligibility from future competition. This has been ameliorated by the modified strict liability principle. This was after a legal opinion of 2003 made it clear the strict liability principle did not violate international standards of law, including human rights, but only in respect of the disqualification. The provisions allowing a reduction or elimination of sanction based on a partial or total absence of negligence were added as a result of that opinion<sup>475</sup>. The athlete now has ‘presumed fault’ in that the conviction is obtained by proof of the mere presence of a banned substance. However, the athlete has the opportunity, or the reverse burden, to prove that they should not be blamed for their actions to escape or reduce a ban<sup>476</sup>. This is argued to allow the athlete to prove they are not at moral fault, as in the *Gasquet* case<sup>477</sup>, and thus should escape at least a significant period of ineligibility.

In terms of the subsequent ban, if a level of moral fault is reached then the athlete should lose all benefit from that act, which is not disputed. The problem arises in that currently the consideration of fault takes place at the sanctioning phase only, resulting in no appreciable reduction in the use of SGB resources as already pointed out. This means that the ‘conviction’ is recorded and a moral stain is affixed as discussed at length. Where there has been a deliberate attempt to flout the rules, then the current system, while clumsy, achieves a just result, a ban, and associated opprobrium. This research is motivated, *inter alia*, by a real concern that too many morally innocent athletes are being convicted, however this does not address the problem of serial cheats and causes a loss of faith in the system by the very people it is supposed to serve.

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<sup>475</sup> Foschi (n 289) 477.

<sup>476</sup> Soek (n 104) 152.

<sup>477</sup> See James (n 235) 60, where he points out that surprisingly, although able to do so after the no fault finding, *Guasquet* did not seek to have his ban overturned.



The alternative means of principle-based rule drafting being proposed later in this research would go a long way to addressing that concern.

#### **6.1.2.8 Concluding the strict liability in sport debate**

Before moving on to the fate of human-equine partners under a strict liability regime in detail, it is important to arrive at a position on strict liability in general and sport in particular. For the avoidance of doubt, there are arguments for strict liability which are hard to counter. In particular, it is a useful tool in ensuring the health of athletes is protected. The argument is perhaps at its strongest when applied to *non-human athletes* as the most vulnerable, least autonomous of all. In human-only sport the ‘death in the locker room’ argument<sup>478</sup> is highly pertinent. More than 50 percent of elite athletes surveyed would take a PED which was undetectable and guaranteed sporting success despite resulting in death within five years. The question must be asked as to what degree would that percentage rise if the death concerned was that of ‘only’ a horse.

There is also a strong argument that a disqualification must be inevitable after an *adverse analytical finding* in that the athlete has not competed on equal terms with his or her adversaries. This is best underpinned by a regime of strict liability because the evidential requirements for SGBs would be too onerous to satisfy if they had to prove some sort of *mens rea*. There is, however, also an interesting debate about whether there is such a thing as a ‘level playing field in sport’ anyway, and this ought to be addressed. The best way to do that is to consider not relying on strict liability in literally interpreted detailed provisions in the way that will be discussed later. This is, for the purposes of this research, in equine sport, but possibly more generally. Again, for the avoidance of doubt, if the horse is disqualified from the event in question, the rider must be as well. It would be strange indeed if one member of the team were to receive a medal whereas the other is disqualified. Such would not be allowed to happen in human only sports, such as the 400 metre relay.

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<sup>478</sup> Bob Goldman and Ronald Klatz, *Death in the Locker Room: Steroids in Sport*, (South Bend, IN: Icarus Press 1984) and Goldman and Klatz (n 137).

In terms of subsequent ineligibility, strict liability is least defensible. It is based on science but that science is not universally accepted and there seems to be no real appreciation of the *de minimis* principle if hairspray and traces of human urine can trigger proceedings. The *Tramadol* case may only have resulted in disqualification, but there will always be those that say, ‘there’s no smoke without fire’ and the ‘report card’ is forever marked. It is also not sufficient to simply dismiss the emotional and financial consequences to the wrongly convicted as inevitable collateral damage in the fight against doping. Raising the difficulty in proving fault at the liability stage is not convincing either because, as in criminal law, this *must* be addressed during sanctioning. Further, in sport there is a specific standard of proof to address, with scientific and witness evidence necessary, which means that no effort is saved by leaving this to the stage where a ban is considered. We must be clear on the team point again though. It would be better if moral fault were considered at the liability stage, but wherever it is found then the rider must be rendered ineligible for a period of future competition. Where evidence suggests it was not the rider at fault, such as in the Al Zarooni case at Sheikh Mohammed’s stables, then sanctions must fall on the appropriate person or persons. This would, in the above case, be the trainer.

However, in sum, taking an overview, strict liability is not fit for purpose for equine sport, particularly because there are too many variables at play. The *human* suffers a sanction for the infraction in the body of an *animal* which they may or may not have frequent contact with. This is a world away from the autonomous athlete responsible for everything they ingest. It is in the context of this conclusion that the following investigation is undertaken.

### **6.1.3 Human strict liability in respect of the non-human athlete**

The weight of current academic opinion is currently that strict liability in human athlete cases is not a breach of Article 6(2) European Convention on Human Rights (ECHR)<sup>479</sup> *per se* although this research has proven that fundamental rights arguments embedded in a private law claim do provide an avenue of potentially successful challenge. This section considers why the

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<sup>479</sup> See Houben (n58) p11.

fundamental rights of the human athlete, trainer, or owner are affected especially when strict liability is applied *where the athlete contaminated is not human*<sup>480</sup>.

The EADCMRs make reference to a number of what would be rules of evidence if a matter were before a criminal court. Here at least there seems to be some acceptance that development of the rules needs to be on a trajectory that keeps them in line with developments in domestic legal systems and fundamental rights. The amendments which came in to force after the *Al Eid* and *Sharbatly* cases at the beginning of 2013 underline this. The first rule of evidence in question is the acceptable burden of proof and the second is acceptable standard of proof. These are catered for in Article 3 ‘Proof of *ECM Rule* Violations’, specifically 3.1 ‘Burdens and Standards of Proof’. The content of these sections is again very similar in ethos and wording to the FEI human anti-doping provisions covering the same issues<sup>481</sup>. It is worth quoting the provision in full:

‘The FEI shall have the burden of establishing that an ECM Rule violation has occurred. The standard of proof shall be whether the FEI has established an ECM Rule violation on the balance of probabilities. Where these ECM Rules place the burden of proof upon the Persons Responsible and/or member of their Support Personnel to rebut a presumption or establish specified facts or circumstances, the standard of proof shall also be by a balance of probability, except where a different standard of proof is specifically identified.’<sup>482</sup>

As a result of consultation with the national federations, and the findings of the *Ljungqvist Commission* set up in the wake of the 2008 Olympics, this is a key aspect of the EADCMRs which has been significantly modified<sup>483</sup>. The old provision included strict liability for support personnel which has been eliminated and reference to a standard of proof of ‘comfortable satisfaction’ lying somewhere between ‘on the balance of probabilities’ and ‘beyond reasonable doubt’. The comfortable satisfaction standard of proof remains in Article 3.1 of the Equine Anti-Doping Regulations and the FEI’s regulations applicable to human athletes, together with a justification:

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<sup>480</sup> For example ECM Rules, Articles 2.1.1 and 2.2.1 available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 05/08/13).

<sup>481</sup> See for example Article 3.1, FEI Anti-Doping Rules For Human Athletes (ADRHA): *Burdens and Standards of Proof*, available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 05/08/13).

<sup>482</sup> ECM Rules Article 3.1 available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 05/08/13).

<sup>483</sup> FEI website: <http://www.feicleansport.org/faqs.html?#link5> (accessed on 05/08/13).

‘This [comfortable satisfaction] standard of proof required to be met by the FEI or its National Federation is comparable to the standard which is applied in most countries to cases involving professional misconduct. It has also been widely applied by courts and hearing panels in doping cases. See, for example, the CAS decision in N., J., Y., W. v. FINA, CAS 98/208, 22 December 1998’<sup>484</sup>.

N., J., Y., W. v. FINA does indeed clarify that in doping cases the burden of proof is placed squarely upon the SGB to establish the presence of a banned substance in the athlete’s body fluid and that the standard of proof is less than the criminal standard, but more than the civil standard. The judgment goes on to reaffirm that the burden does not shift to the athlete, except in respect of an onus to prove that the maximum sanction should not be applied. The justification found in the FEI Anti-Doping Rules for Human Athletes (ADRHA) is, by implication, also applicable to the EADCMRs. The EADCMRs and ADRHA are closely derived from the WADA Code which has a very similar justification under Article 3.1, except with reference to reverse burdens:

‘Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4[Elimination or Reduction of the Period of Ineligibility] and 10.6 [Aggravating Circumstances Which May Increase the Period of Ineligibility] where the Athlete must satisfy a higher burden of proof’<sup>485</sup>.

The January 2013 amendments do allow the EADCMRs to fit in better with the overall ‘New Internal Regulations of the FEI Tribunal’, published in January 2012, which attempt to deal with burdens and standards of proof too. At 19.24, the new regulations state that the default position for the standard of proof on all questions before the hearing panel is to be ‘on the balance of probabilities’ while allowing for the ‘relevant rules’ to specify a different standard if required. This allowed for some matters to have such as the old ‘comfortable satisfaction’ attached to them

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<sup>484</sup> Article 3.1, FEI Anti-Doping Rules For Human Athletes (ADRHA): *Burdens and Standards of Proof*, available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 05/08/13).

<sup>485</sup> Article 3.1 World Anti-Doping Code 2009 available from [http://www.wada-ama.org/rtecontent/document/code\\_v2009\\_en.pdf](http://www.wada-ama.org/rtecontent/document/code_v2009_en.pdf) (accessed on 11/10/12)

as a standard of proof and so the EADCMRs and Tribunal Rules could ‘dovetail’<sup>486</sup>. The result though is potential confusion; mental gymnastics are required to be clear which burden of proof is required depending on which substance has been found, one prohibited under the EAD or CMR portion of the regulations. ‘Conflation’ already occurs between the two sets of regulations as affirmed by the *Al Eid and Sharbatly* appeal award (see Appendix 1). There is real danger of further confusion with these different standards of proof.

It is furthermore very hard to see why comfortable satisfaction is deemed suitable by two out of the three code-derived regulations utilised by the FEI. If it is unsuitable in one, it is unsuitable in all three, there is no logic for singling out the CMRs for a different standard of proof other than, as Gramsci would see it, to serve the needs of the enforcers. Rule makers and tribunal members in an SGB are rarely if ever competing athletes; they may be former athletes and coaches and others with a fervour for the sport concerned, however once rule makers or adjudicators they are part of the ‘rulers’ rather than the ‘ruled’, to return to the Gramscian analysis, and it is unsurprising that rules will be for their convenience. As Anderson says, a primary driver of the reliance on strict liability is ‘the desire to rid [the SGBs] of their evidentiary problems’<sup>487</sup> and it is striking that he does not find evidence that a desire to avoid miscarriages of justice was important.

At this point this research is analysing the first set of amendments since the *Al Eid and Sharbatly* case<sup>488</sup> as these expose a lack of clarity at drafting stage as much as the study of the case itself does. In the 2012 version, with regard to the reverse burdens in the CMR portion of the EADCMRs, there was no specific mention of a standard of proof, so the applicable standard would be on the balance of probabilities. It would be remiss however not to examine the equivalent provision under the EAD Rules. In the old pre-January 2013, Article 10.4 of the EAD Rules the standard of proof placed upon the ‘person responsible’ or member of ‘support personnel’ under the reverse burden specified was worded thus:

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<sup>486</sup> New Internal Rules for the FEI Tribunal, available at <http://www.fei.org/fei/your-role/athletes/fei-tribunal> (accessed on 12/08/13).

<sup>487</sup> Soek (n 104) 151.

<sup>488</sup> There were further amendments, most recently in January 2015 which included a prohibited association clause for the first time, with a reverse burden, but to address repeated annual changes in this chapter would not add clarity.

‘To justify any elimination or reduction [in sanction], the *Person Responsible* and/or member of the *Support Personnel* (where applicable) must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the *Hearing Panel* the absence of an intent to enhance sport performance in the *Horse* or mask the *Use of a Banned Substance or Banned Method*.’

After the 2013 amendment Article 10.4.1 stated:

If the Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Fault or Negligence for the EAD Rule violation, the otherwise applicable period of Ineligibility...may be eliminated in regard to such Person...[who] must also establish how the Banned Substance entered the Horse’s system in order to have the period of Ineligibility and other Sanctions eliminated<sup>489</sup>.

In the January 2013 revisions, in EAD Rule cases the standard of proof became the same when the burden is reversed as when the burden is on the FEI. The effect of the previous wording was to place the burden at an unconscionably high level for the accused. At least that inequity has been addressed, but questions must still remain about the suitability of the civil standard in any portion of what are quasi-criminal regulations unless applicable to the defendant. By way of completeness, it should be noted that in keeping with the WADA Code, in equine doping and controlled medication rule violation cases, there is little restriction on the use of hearsay evidence and that adverse inferences from silence may be drawn by a hearing panel<sup>490</sup>.

#### **6.1.3.1 How comfortable should we be with ‘comfortable satisfaction’?**

In law, a number of civil provisions require an enhanced standard of proof, such as measures used to control the movements of sex offenders and Football Banning Orders<sup>491</sup>. If a sporting

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<sup>489</sup> Article 10.4.1 EAD Rules available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 13/08/13).

<sup>490</sup> Article 3.2.4 ECM Rules and EAD Rules (EADCMRs) and ADRHA available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 11/10/12).

<sup>491</sup> See Gardiner (n 80) 577-578.

body, in this case the FEI, wishes to specify a higher standard of proof than the civil standard then it can do so. This right is supported by the contractual argument discussed as supporting sporting strict liability earlier, a sportsperson unhappy with the concept can consider another career.

It would be useful however, to consider why the FEI may have moved away from the use of ‘comfortable satisfaction’ as a standard of proof in the CMR portion of the EADCMRs by looking at some wider themes. In doing so we find further support of the recurring contention that anti-doping proceedings are now quasi-criminal. A key thread is the creeping conflation between criminal law ideas and concepts and those of anti-doping rules. These have been discussed in relation to equestrian sport, but there is supporting evidence from other sports. In the USADA ‘Reasoned Decision’ of October 2012 regarding the activities of Lance Armstrong and several other key cyclists and support personnel dating back as far as 1998, specific reference is made to standards of proof:

‘As noted in the comment to Article 3.1 [WADA Code], this standard of proof is comparable to the standard which is applied in most countries to cases involving professional misconduct. Thus, for example, in proceedings in the United States to take away the license to practice of a doctor or lawyer, the applicable standard of proof is typically ‘clear and convincing evidence’. In this case, the evidence against Mr. Armstrong is overwhelming. In USADA’s view, it establishes his doping beyond a reasonable doubt’<sup>492</sup>.

Explicit use of ‘criminal law’ language in a doping case brought by a NADO is worthy of note. In English law, a useful definition of what proof beyond a reasonable doubt means was provided by Denning J:

‘...if the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it is possible but not

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<sup>492</sup> USADA v Lance Armstrong, ‘Reasoned Decision on Disqualification and ineligibility’ available from [www.usada.org](http://www.usada.org) accessed on (11/10/12).

in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.'<sup>493</sup>

'Comfortable satisfaction' is a concept more commonly found in civil law jurisdictions and does not have a direct equivalent in common law jurisprudence<sup>494</sup>. Furthermore, the application of a 'non-traditional' (in common law terms) standard of proof somewhere between a criminal and civil standard, usually for the convenience of the prosecuting authority, is not new. In the UK, the House of Lords has wrestled with this point in the context of Anti-Social Behaviour Orders (ASBOs), the Human Rights Act 1998, and European Court of Human Rights (EctHR) jurisprudence. The results produce more questions than answers unfortunately, in the conjoined appeals of *McCann* and *Clingham*<sup>495</sup> it was considered whether the proceedings leading to the making of an ASBO (as distinct from those arising from the breach of one) were criminal in nature under domestic law and/or Article 6 of the ECHR. Lord Steyn gave the leading judgment and the remaining four Law Lords largely concurred with his reasoning. In the absence of a direct statutory provision defining criminal law, case law was relied upon. In the case of *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310, 324, the view of Lord Atkin was that criminal proceedings are restricted to those considering 'acts or omissions as are prohibited under appropriate penal provisions by authority of the state'. In *Customs and Excise Comrs v City of London Magistrates' Courts* [2000] 1 WLR 2020 2025 Lord Bingham was of the view that criminal proceedings 'involve a formal accusation made on behalf of the state...that a defendant has committed a breach of the criminal law and the state...has instituted proceedings which may culminate in the conviction and condemnation of the defendant'. This last judgment in particular is somewhat circular, in that it appears to say that criminal proceedings involve a breach of the criminal law when the whole point of the appeal was to establish whether some civil proceedings might be characterised as criminal because of their nature rather than their label.

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<sup>493</sup> *Miller v Minister of Pensions* [1947] 2 All ER 372

<sup>494</sup> See Michael Beloff, 'Drugs, Laws and Versapaks', in *Drugs and Doping in Sport: Socio-Legal Perspectives*, (London: Cavendish 2000) 50 cited in Gregory Ioannidis 'The Application of Criminal Law on Doping Infractions and the 'Whereabouts Information' Rule: State Regulation v Self-Regulation.' (2010) *The International Sports Law Journal* 1.2 (2010): 14, 10.

<sup>495</sup> *Clingham v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 (17 October 2002)



From a criminological point of view, the use of civil provisions to maintain social order was particularly cynical. It is what is referred to as ‘net widening’<sup>496</sup> in that it seeks to bring persons within the remit of the criminal justice system. These are usually for what would otherwise be criminal offences anyway – minor damage, minor public disorder and so on – but in an ASBO case, the inconvenience of having to prove matters to the criminal standard is lacking. It was right then that the House of Lords saw fit to examine exactly what the proper standard of proof was in such detail.

In any event, all five Law Lords held that ASBO proceedings are civil in terms of domestic law and also in terms of Article 6 ECHR. They conceded that Article 6(1), the right to a fair and public hearing, applies to ASBOs therefore, but not Articles 6(2) or 6(3) which apply only to criminal charges. Despite this, the judgment went on to say that the standard of proof in such proceedings is the civil one, (i.e. usually on the balance of probabilities) but, given the seriousness of the issues, a heightened standard should apply and agreed with the view of Lord Bingham of Cornhill in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354, that the heightened civil standard and the criminal standard are virtually indistinguishable. For all practical purposes then, the *criminal* standard of proof of ‘beyond a reasonable doubt’<sup>497</sup>, (translated in the summing up in more recent cases as ‘sure’<sup>498</sup>) should apply in *civil* ASBO cases. This already having been decided in relation to civil sex offender orders<sup>499</sup>. This means that when tribunals move away from the traditional ‘poles’ in standards of proof, the result is that the criminal standard is *de facto* substituted for the civil one. This is logical because there are no real gradations between the criminal and civil standards; in other words, no easily applicable sliding scale.

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<sup>496</sup> Maeve McMahon, ‘Net-Widening – Vagaries in the Use of a Concept’, (1990) 30 *Brit. J. Criminology* 121.

<sup>497</sup> In English criminal cases the term ‘sure’ is now preferred to ‘beyond a reasonable doubt’ but there is no discernible difference in meaning between the two terms.

<sup>498</sup> *R v Stephens* [2002] EWCA Crim 1529.

<sup>499</sup> *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354

Moving back to standards of proof specifically in sports law, there was an important case before the BHA Disciplinary Panel Appeal Board involving bet-fixing allegations<sup>500</sup>. A significant ground of appeal was that the BHA only had to prove its case against the owners, gamblers, and jockeys concerned on a ‘balance of probabilities’. Counsel for the accused argued that the applicable standard was one of ‘beyond reasonable doubt’ and referred to the wording of The Rules of Racing (2001) at Schedule (A)6 paragraph 16:

“Where any fact or matter is required to be established to the satisfaction of the Authority, the standard of proof shall be the civil standard which is to say the standard applied in the civil courts of England in a dispute between private Persons concerning a matter of comparative seriousness to the subject matter of the enquiry”

Counsel argued that this provision pre-dated changes in domestic case law which over-ruled cases where it was suggested gradations within the civil standard of proof were possible. Specifically, the attention of the appeal panel was drawn to *Re Doherty* 2008 UK HL and *Re B (Children)(FC)* [2008] UKHL 35. Baroness Hale and Lord Hoffman accepted that there might be times when a criminal standard could be applicable to a civil case following the reasoning in *McCann*. Both were, however, clear that any previous precedents that indicated a heightened civil standard of proof existed were wrongly decided on that point. This would include *Gough v Chief Constable of Derbyshire*<sup>501</sup> and *R v Winkler*<sup>502</sup> on Football Banning Orders. The ruling in *Gough* referred to an ‘exacting standard of proof’, but did not go as far as to say this is the same as the criminal standard. For the avoidance of doubt, in English law this means that deviating from the civil standard of proof means using the criminal standard. Thus, if an appeal was mounted from a tribunal to an English court, it is difficult to see how ‘comfortable satisfaction’ would be treated any differently to ‘beyond reasonable doubt’, whatever the drafters’ intention.

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<sup>500</sup> Appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold and Kirsty Milczarek (10/04/12) available at <http://www.britishhorseracing.com/resources/about/whatwedo/disciplinary/disciplinaryDetail.asp?item=096634> (accessed on 06/11/12) (see also Appendix 2).

<sup>501</sup> *Gough v Chief Constable of Derbyshire* [2002] 2 All ER 985 CA (Civ. Div.)

<sup>502</sup> *R v Winkler* [2004] EWCA Crim 1590.

Ultimately the appeals considered above were rejected by the BHA Appeal Board who found that the applicable standard required of the BHA as prosecutor was the civil standard. As it is in domestic law, so it should be in all sporting tribunals. In the UK, it is no longer good law to refer to anything either than a criminal or a civil standard. Collectively these points mean that, for all intents and purposes, the standard of proof required for Articles 3.1, 10.4 and 10.6 of the WADA Code to operate would be construed as ‘beyond reasonable doubt’ or ‘sure’ if the matter were before an English court of law. The difference between the FEI standard of proof, and that of the BHA, has been discussed and will be considered further. That is, in the context of the *interface problem* and ‘prohibited association’ in particular.

The wording of the CMR portion of the EADCMRs has moved away from what is effectively a standard of ‘sure’ to ‘on the balance of probabilities’ and again the FEI has a perfect right to do this. This trajectory does raise, however, the question of why the same changes have not been made to the EAD portion of the EADCMRs or the FEI’s human doping regulations, the ADRHA. This latter still requires a standard of ‘comfortable satisfaction’<sup>503</sup>, even after the 2013 amendments. If, as is contended here, this equates to ‘beyond reasonable doubt’ in English law this is a very high threshold for a reverse burden. Further, unexplained inconsistencies are evidence that Beloff was right when he said the following:

‘...in my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here; a loft there; a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole.’<sup>504</sup>

In sum, the FEI is perfectly entitled to specify ‘comfortable satisfaction’, however this may be interpreted in other jurisdictions. Case law makes it clear that in English law this is a very high standard, the criminal one. This might well be appropriate for the prosecutor, but it is the inconsistency across the piece that is unfortunate. Together with this, the very high burden

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<sup>503</sup> Article 3.1 ADRHA available from [http://www.fei.org/sites/default/files/FEI\\_ADRHA\\_based\\_on\\_2009\\_revised\\_Code\\_1Jan2011\\_updated\\_1Jan2013\\_markup.pdf](http://www.fei.org/sites/default/files/FEI_ADRHA_based_on_2009_revised_Code_1Jan2011_updated_1Jan2013_markup.pdf) (accessed on 13/08/13).

<sup>504</sup> Michael Beloff, ‘Drugs Laws and Versapaks’ in O’Leary (n 59) 40.

sometimes, but not always, placed on the defendant is also of greatest concern and possibly the most open to legal challenge.

#### 6.1.4 Reverse burdens of proof in equine cases

In order to fully consider the evidential rules which emanate from the EADCMRs, it is necessary to consider what we mean by reverse burdens in general. It is a long-established principle of Anglo-American legal systems that an accused is innocent until proven guilty, in English law, this is the *Woolmington*<sup>505</sup> principle. However, we should be clear that there are times when a burden does shift to the defence, even in criminal cases, and also that there is a distinct difference between an evidential burden and a legal burden<sup>506</sup>.

The evidential burden is the onus to produce enough evidence such that the matter warrants consideration by the tribunal, the *Galbraith*<sup>507</sup> test is applied. If, for example, the prosecution in a criminal trial could not even provide any evidence that the accused was at the scene of the crime then there may be no *prima facie* case to answer, and the judge may direct the jury to acquit. Similarly, if the accused raises an affirmative defence, one that admits to involvement in the alleged act, but in turn alleges an excusatory factor, such as self-defence, then there will be an evidential burden on the defence to produce *some* evidence to support that claim. Notably in neither situation is a *standard* of proof applied to an evidential burden<sup>508</sup>.

The legal burden is the onus on – again, usually – the prosecution to prove the facts in dispute until the tribunal is ‘sure’ of the accused’s guilt. When the legal burden falls on the defence in criminal cases, such as in insanity cases<sup>509</sup>, then the standard applied is one of a balance of probabilities. The reasoning being that the defence has neither the resources nor the required access to relevant information to prove matters to the higher criminal standard. Therefore in accordance with the interests of the ‘equality of arms’ principle, the higher standard is not required of them.

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<sup>505</sup> *Woolmington v DPP* [1935] AC 462 HL(E).

<sup>506</sup> See for example *Dennis* (n 110) Para 11.5.

<sup>507</sup> *R v Galbraith* [1981] 1 WLR 1034.

<sup>508</sup> *Dennis* (n 110) Para 11.6.

<sup>509</sup> *Woolmington v DPP* [1935] AC 462 HL(E) *per* Lord Sankey L.C.

#### 6.1.4.1 Reverse burdens in the EADCMRs

We could continue to consider the EAD provisions, looking for reverse burdens therein. In keeping with the main theme of the chapter however, the *Al Eid* and *Sharbatly* case, we should consider whether the reverse burdens found within 3.2, 10.4 and 10.5 of the CMRs are legal, evidential, or ‘tactical’<sup>510</sup> in nature. Before the January 2013 revisions, under 3.2.1 there was a presumption that the FEI-approved laboratories had followed correct procedure, however there was a full legal and an evidential burden on the accused person to: ‘rebut this presumption by establishing by a balance of probability that a departure from the *FEI Standard for Laboratories* occurred which caused the *Adverse Analytical Finding*.’ If successful, that triggered a legal and evidential burden falling upon the FEI to ‘establish to the comfortable satisfaction of the *Hearing Panel* that such departure did not cause the *Adverse Analytical Finding*.’

The post January 2013 wording however again omits reference to the ‘comfortable satisfaction’ concept:

‘The Person Responsible and/or member of the Support Personnel who is alleged to have committed the ECM Rule violation may rebut this presumption by establishing by a balance of probability that a departure from the FEI Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding. If the preceding presumption is rebutted by showing that a departure from the FEI Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the FEI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.’<sup>511</sup>

Some similar statutory presumptions, and reverse burdens, exist in English criminal law, for example in drink driving provisions which do bear some comparison with doping ‘offences’. In

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<sup>510</sup> This is not a term of art like the previously discussed burdens but it can nevertheless impose a very real onus on an accused to rebut an assertion made by the prosecuting authority, see Dennis (n 110) Para 11.6.

<sup>511</sup> Article 3.2.1 ECM Rules available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 13/08/13).

Section 15 Road Traffic Act 1988, there is a presumption that the equipment for testing blood alcohol levels is functioning correctly. If a defendant raised the issue of improper functioning of such equipment, then there would at least be an evidential burden on the defence. In *Cracknell v Willis* (1998) 1AC 450 it was held that when the breath testing equipment is challenged, the court must remain satisfied that it can rely upon the instrument which provided the reading. A prosecuting authority would normally attempt to satisfy the court by producing logs, servicing records, calibrations, and the like relating to the equipment in question.

In the revisions, it is unhelpful to use the word ‘establishing’ instead of ‘proving’, but there is nothing inherently wrong in a tribunal changing its mind during the course of hearing evidence from both sides. This section suggests that both sides have the same burden of proof however, that is, the civil standard. If a defence is raised in a criminal trial, which would be analogous, then only the defendant has the benefit of a lower standard of proof, not the prosecution. Furthermore, ECtHR jurisprudence already discussed suggests that where the consequences to the defendant are onerous enough, a reverse burden should be evidential in nature only. These sporting proceedings are not acknowledged to be criminal in nature, but this research has been consistent in pointing out commentary that they ought to be considered *quasi*-criminal because of their effect.

### **6.1.5 Strict liability and rules of evidence in equine sport – a case study**

It is worth noting that of all the sports – human and non-human – the first to have doping control of any sort involved horses. Race horses were subject to anti-doping rules early in the 20<sup>th</sup> century as a result of allegations involving the administration of cocaine<sup>512</sup>. This began the journey to the complex and detailed rules in place today predicated on strict liability. In the last section, it was observed that such liability is predominantly a common-law animal. The WADA Code and CAS draws from both the civil legal tradition and that of the common law as shall be discussed later. At first glance, it is odd that strict liability should have been so readily adopted in

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<sup>512</sup> Carter (n 292) 105.

much sporting integrity regulation therefore. Notwithstanding this, as stated earlier, this is the absolute right of the SGB or IF, and a sporting participant can ‘take it or leave it’.

Questions have already been raised in the literature as to whether anti-doping regulation is *quasi-criminal*, indeed on that basis whether generally CAS is a suitable arbitral body to be trying matters with such punitive outcomes<sup>513</sup>. The discourse in the pages to come looks at these issues through the unique lens of sports involving the non-human athlete. For clarity and reasons of space, the discussion centres on the FEI’s regulations, although many of the arguments could be used regarding parallel provisions in the BHA’s Orders and Rules of Racing. As this is a case study, the regulations are discussed as they were in 2012, with some commentary with regard to later amendments in so far as they illuminate the flaws in the regulations. The yet further amendments to the time of writing, such as those in 2015, have not affected the central arguments in this chapter.

At the time of commencing the research for this chapter, on the eve of the 2012 London Olympics, 71,649 tests had been carried out on potential Olympians in the previous six months resulting in 107 sanctions<sup>514</sup>. The 2012 Games themselves have been noted as the most tested ever, with 4,770 tests at Beijing in 2008 with 20 failures (including six horses), and 2,149 tests at the winter games in Vancouver in 2010, including three failures<sup>515</sup>.

At least two of the 2012 figures quoted involved drugs administered to show jumping horses. Khaled Abdulaziz Al Eid riding *Vanhoeve* and Abdullah Waleed Sharbatly on *Lobster 43* were handed eight month bans by the FEI after their horses tested positive to the non-steroidal anti-inflammatories phenylbutazone and oxyphenbutazone at events in Riyadh and Al Ain earlier in the year<sup>516</sup>. These drugs are commonly used in leisure horses and are not performance enhancing but are banned for competition use because they can mask an injury, risking further damage to the horse. CAS subsequently reduced these bans to two months allowing the riders to compete at

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<sup>513</sup> Downie (n 48) 16-17.

<sup>514</sup> ‘London 2012: Selsouli to miss Games after failed drugs test’, (BBC Sport Online 25 July 2012) available at: <http://www.bbc.co.uk/sport/0/olympics/18985217> (accessed on 31/10/15)

<sup>515</sup> Charlish (n 25) 1.

<sup>516</sup> <http://www.telegraph.co.uk/sport/olympics/equestrianism/9285257/London-2012-Olympics-Saudi-Arabian-show-jumpers-to-appeal-FEI-ban.html#> (accessed on 20/08/12)

London 2012. Sharbatly, riding another horse, *Davos*, went on to be part of the bronze medal winning Saudi team at the Team Jumping event, the Kingdom of Saudi Arabia's only medal in any sport of the 2012 Games<sup>517</sup>.

These instances demonstrate the enormous potential consequences of drug rule breaches, even of a relatively 'minor' kind like those in this case. Furthermore, this is a demonstration of how much turns on the decision of a tribunal, even as in this case a single arbitrator<sup>518</sup> (see also Appendix 1). It does not go too far to say that national pride, careers, and reputations all hang in the balance when these cases are heard.

The debate on strict liability and rules of evidence in human doping cases has been well aired<sup>519</sup>. The reason why the Olympic equestrian sports provide any further need for discussion in these areas is that sports involving human/animal combinations are fundamentally different from those involving only human athletes in several key respects. As the world governing body for these sports, the FEI puts it on its 'Clean Sport' webpage, 'Equestrian sport is a unique case of a sport that involves animal and human athletes working together as a team'<sup>520</sup>. This turn of phrase has already been shown in Chapter 4 to be more than a term of art and having real and practical consequences for this research.

## **6.2 A background to the FEI regulation and disciplinary procedures**

This chapter is primarily concerned with the three Olympic equestrian sports – show jumping, dressage, and eventing – as well as Paralympic dressage. Detailed discussion of other sports – such as vaulting, reining, and carriage driving – are excluded to maintain a manageable scope. Uniquely in Olympic sport, there are in effect three separate sets of drug controls in equestrianism. The FEI has the Anti-Doping Rules for Human Athletes (ADHRA)<sup>521</sup> and also the Equine Anti-Doping Rules<sup>522</sup> and Controlled Medication Rules<sup>523</sup> (EADCMRs), these latter

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<sup>517</sup> <http://www.london2012.com/medals/> (accessed on 20/08/12)

<sup>518</sup> CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale (See Also Appendix 1).

<sup>519</sup> See for example Wise (n 10) and Young (n 10).

<sup>520</sup> FEI Clean Sport website: <http://www.feicleansport.org/> (accessed on 22/08/12).

<sup>521</sup> FEI Clean Sport for Humans: <http://inside.fei.org/fei/cleansport/humans> (accessed on 11/03/17).

<sup>522</sup> Concerned primarily with PEDs



being contained in a single document with two sections<sup>524</sup>. What all three have in common is that they are developed from, and remain very similar to, the Worldwide Anti-Doping Agency (WADA) Code. These are administered at national level by national anti-doping organisations (NADOs). In Great Britain that is UK Sport, which was established by Royal Charter in 1997. The FEI subscribes to the Prohibited List of Substances and Methods (steroids, stimulants, gene doping etc.) published annually by WADA<sup>525</sup>. There is a direct appeal route to CAS.

To provide clarity and avoid conflation of the arguments regarding the different sets of rules under the FEI, it will be useful to explain the three different anti-doping procedures to which the human-equine team is subjected in more detail. In doing so, it will be possible to evaluate which, if any, are the most likely to be so inequitable, that ordinary notions of due process and procedural fairness cannot be met. If the answer is ‘all of them’ then we can at least identify which can be considered within the scope of this research.

### 6.2.1 The ADHRA

The regulations regarding human anti-doping which apply to the riders in FEI sports are virtually the same as would be applied to any human athlete in all code-compliant sport. For instance, Article 2.1 of the ADRHA<sup>526</sup> which underpins the notion of strict liability is substantively the same as that found in the 2015 WADA Code and, for instance the anti-doping rules for the *Union Cycliste Internationale* (UCI)<sup>527</sup> and British Athletics<sup>528</sup>. Applying these rules to humans participating in equine sport is no more nor less inequitable than they are when they pertain to runners, cyclists, or for that matter archers or tennis players. The application of strict liability, reverse burdens and the like to human athletes is not the focus of this research. This thesis considers the fairness *on the human* of the application of these principles. Especially as the

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<sup>523</sup> Concerned mostly with medication that might mask a deficiency and entry into competition might therefore be detrimental to the horse. These rules are primarily animal welfare in focus.

<sup>524</sup> FEI Clean Sport for Horses: <http://inside.fei.org/fei/cleansport/horses/regulations> (accessed on 11/03/17).

<sup>525</sup> FEI Website: <http://www.feicleansport.org/> (accessed on 22/08/12).

<sup>526</sup> Article 3.1 ADRHA available at: <http://inside.fei.org/fei/cleansport/humans/regulations> (accessed on 21/04/17).

<sup>527</sup> UCI Part 14 Anti-Doping Rules, available at:

[http://www.uci.ch/mm/Document/News/Rulesandregulation/16/85/60/20161216UCIADRP14-FINALversionenligne2016.12.16\\_English.pdf](http://www.uci.ch/mm/Document/News/Rulesandregulation/16/85/60/20161216UCIADRP14-FINALversionenligne2016.12.16_English.pdf) (accessed on 21/04/17).

<sup>528</sup> British Athletics Anti-Doping Rules, available at: <http://www.britishathletics.org.uk/cleanathletics/rules/> (accessed on 21/04/17).

infraction of the rules happens in the *body* of one athlete who is non-autonomous and not human, yet the sanction applies to the *mind* of another athlete who is human. Thus, there is no purpose for this research in examining these rules and it is in any event beyond the scope of a work this size.

### **6.2.2 The EADCMRs**

The FEI's regulations that apply to horses is in a single document, yet there are two distinct parts<sup>529</sup>. The Equine Anti-Doping Rules (EAD) are in place to combat the use of performance enhancing drugs in horses, and the Controlled Medication Rules (CMR) are there to prevent substances being given to horses which are medicinal, but would be unsuitable for competition use. This is because they may mask an injury causing that hurt to be exacerbated by the strain of competition. An example of that would be phenylbutazone or 'bute' which has a similar effect to paracetamol in humans. A leisure horse might be prescribed that for minor aches and pains and still be ridden, but it is illegal in competition use. Both these sets of rules are closely based on the WADA Code, just as the ADHR are, with the exception of the substitution of some phrases to make sense when applied to equines.

With the above in mind, the following discussion does not address the ADHR. Further, the discourse makes no substantive distinction between the EAD and CMR portions of the EADCMR, as the effect is the same on the human, irrespective of what the prohibited substance is alleged to have done in terms of the horse. Put another way, the analysis is focusing on the possibility of injustice done to the human by the application of either set of rules, the sanctions in both have the same effect, and the legal principles considered apply in both. For this research then, strict liability, reverse problems and the like are considered as a problem *when the equine athlete has returned a positive test*.

### **6.2.3 Why is the *status quo* a particular problem for equine adverse analytical findings?**

The procedures for the testing and enforcement of human doping regulations and the regulations themselves are well debated. Charlsh, for example, notes that now that formal cooperation between anti-doping authorities and state policing organisations such as between UK Anti-

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<sup>529</sup> EADCMRs, available at: <http://inside.fei.org/fei/cleansport/> accessed on 21/04/17).

Doping (UKAD) and the Serious and Organised Crime Agency (SOCA) is on the increase ‘questions and concerns over the compatibility of anti-doping processes and basic human rights will continue to grow’<sup>530</sup>. These issues have however not been examined through the lens of equestrian sport. In order to do so the *Khaled Abdulaziz Al Eid* and *Abdullah Waleed Sharbatly*<sup>531</sup> (see Appendix 1) case will be appraised in detail as a vehicle to carry out this examination.

Equine sporting integrity deserves separate consideration to that pertaining to human only sports. Soek notes that in sport generally, ‘...samples are collected often by unqualified people in chaotic circumstances, transported across national boundaries and arriving at the laboratory very often without any kind of proper manifest evidencing what is called the chain of custody...’<sup>532</sup>. These problems are magnified when considering samples taken from horses in less than hygienic conditions and when dealing with half a metric tonne of excited animal. Furthermore, these are animals that may not be easily distinguishable to the eye, one from another. This is especially when dealing with predominantly bay thoroughbreds on a race course. The arguments on the strict liability points are further complicated by the fact that a horse may be doped by an owner, rider, or coach who wishes it to do better than its competitors. The animal can have been interfered with by a number of individuals, not necessarily at the behest or even with the knowledge of the person who ultimately could benefit and/or who may face liability under current rules. An owner (for tactical reasons), a rival (for obvious reasons), or someone who wishes to benefit from a ‘spot bet’ may dope the horse to underperform. This is a much more difficult situation to detect than should the equivalent happen to a human athlete, not least because the horse cannot deliberately communicate its own state of health to humans. The horse cannot form, nor communicate ‘suspicions’, beyond a basic level of instinctive trust or distrust, about those humans it interacts with. The lack of autonomy in the *non-human athlete* has been noted earlier as perhaps the best argument for strict liability in consequence.

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<sup>530</sup> Charlish (n 25).

<sup>531</sup> CAS 2012/A/2807 *Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale*/CAS 2012/A/2808 *Abdullah Waleed Sharbatly v. Fédération Equestre Internationale* (See also Appendix 1).

<sup>532</sup> Soek (n 104) 107.

The preceding discussion in this thesis on the modern social construction of the horse proves that the ‘horse *qua* athlete’ has a solid basis in social science research, and is not just lip service to

**Figure 7 - Charlotte Dujardin on Valegro.**



the concept. If the horse athlete in the team fails a doping test then the rider or other ‘person responsible’ faces a potential ban, irrespective of who administered the substance to the horse, rendering the combination ineligible to compete. Top level competition horses can be so valuable they are often owned by a syndicate, for example London 2012 Team GB’s Charlotte Dujardin’s gold medal winning dressage mount *Valegro* (see Fig. 7) would have changed hands for a rumoured £6m,

largely as a result of that win<sup>533</sup> but for a change of heart by the owners, Roly Luard and Carl Hester. Although competitors do spend an enormous amount of time with their animals, they are not inseparable, and there are a number of stakeholders involved in every part of the horse’s life. These facts represent yet one more removal from the human athlete ‘norm’ of an autonomous being wholly responsible for all that goes into his or her body.

Equine competition is also unique in the world of sport because one part of the combination has rights, but not *human* rights and animal rights themselves being a contested area in addition<sup>534</sup>. There are those who would argue the need to expand basic human rights to all ‘intentional beings’<sup>535</sup> but it is not intended to explore that argument here. At the other end of the spectrum it might be tempting to raise the analogy of the Formula 1 racing car. Clearly Lewis Hamilton could not compete without his car being in full working order, and some rule infringements in relation to car design or fuel composition could have severe consequences for an F1 team. However, the analogy breaks down in that the machine has no rights at all. Horses obviously cannot give informed consent, but this piece cannot encompass animal rights *per se* within its remit in all but the periphery. This all adds further weight to the argument that the pairing of

<sup>533</sup> Horse and Hound Online, available at: <http://www.horseandhound.co.uk/news/397/313766.html> (accessed on 20/08/12)

<sup>534</sup> See for example Bob Bermond, ‘*The Myth of Animal Suffering*’ in Armstrong and Botzler (n 458) 79.

<sup>535</sup> Paola Cavalieri, ‘*For an Expanded theory of human rights*’ in Armstrong and Botzler, (n 458) 30.

equestrian athlete and horse athlete are without precedent. The FEI turned a ‘new leaf’<sup>536</sup> in relation to anti-doping, but it is necessary to examine whether this was anything other than tinkering with a system that needs a total re-design.

### **6.3 Avenues of challenge for equine miscarriages of justice**

If there are any substantial inequities in the rules pertaining to equine sport, it is essential to know firstly what redress there is available to the aggrieved sports participant and, from the SGBs point of view, what are the vulnerabilities to challenge that the *status quo* exposes them to. In order to fully examine ‘due process’ in FEI-governed sport, it is necessary now to take a short journey around the possibilities available to a sportsperson in terms of challenging a decision made by any SGB.

Much if not all of the following discourse would apply to any sportsperson but no less so an equestrian, jockey, or trainer. An equestrian competing under the FEI regime has a direct appeal route to CAS, not so a participant in horse racing which has no direct connection with CAS. If the appeal is unsuccessful, or if no appeal to CAS is possible, then an arbitral award can be challenged in a domestic law court. These cases face significant obstacles, in *Gundel v FEI*<sup>537</sup> the Swiss Federal Tribunal (SFT) took the opportunity to affirm that CAS is a real arbitral court, governed by Swiss Federal Law, which is impartial, with an international jurisdiction, which can render final and enforceable awards each with the force of a judgment<sup>538</sup>. The case went against *Gundel* who had brought it on procedural grounds, but there were important ramifications for CAS which need not detain us here. Until recently, the SFT had not interfered with a CAS decision on substantive law grounds, only procedural reasons. The one exception was the *Matuzalém*<sup>539</sup> case which involved a successful challenge to what was, in effect, a lifetime ban on a professional footballer on the grounds that the restraint of trade breached the personal rights of the claimant. The wider applicability of this decision is still unclear however, and this case

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<sup>536</sup> FEI Website: [http://www.prweb.com/releases/FEI\\_Equestrian/Lord\\_Stevens/prweb2824784.htm](http://www.prweb.com/releases/FEI_Equestrian/Lord_Stevens/prweb2824784.htm) (accessed on 22/08/12)

<sup>537</sup> *Gundel v FEI/CAS* 4P.217/1992 (1993) (Switz.)

<sup>538</sup> Gardiner (n 80) 243.

<sup>539</sup> For commentary see for example Valloni and Pachmann (n 238).

and the implications of the *Pechstein*<sup>540</sup> proceedings which challenge the international legality of the CAS arbitration clause have been considered in more depth *supra*.

Taking into account the discussion regarding the contractual nature of sporting participation discussed earlier, for Gardiner, in any event the ‘uncertainty surrounding the process by which rules and decisions of sports governing bodies can be scrutinised by a court’ was resolved by the case of *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB). In this case it was accepted that the decisions of SGBs are susceptible to scrutiny by the courts under a private law supervisory function, albeit with limits<sup>541</sup>. These limits are extended slightly by the fact that for Gardiner, the EU law upon which British judges might rely does allow a slightly more interventionist approach having regard to decisions like *Bosman*<sup>542</sup> and Article 165 of the TFEU. Brexit will, of course, have its effect on that in due course, but for now *McKeown v BHA* [2010] EWHC 508 (QB); [2010] ISLR, SLR-87 further illustrates that supervisory jurisdiction in action.

The situation regarding review of sporting decisions in the courts may be considered more relaxed in jurisdictions such as Australia<sup>543</sup>. In the UK however, in terms of judicial review<sup>544</sup>, the way appears blocked, quite firmly, by a series of decisions that sports governing bodies are not public bodies. The closest that a judicial review decision has come to deciding to the contrary is in *R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy* [1993] 2 All ER 207. Neill LJ was of the view that if the issue had been free of authority the ‘near monopolistic’ powers of the Jockey Club would have meant that its decisions could have been judicially reviewed. Nevertheless, it is quite clear that there is a divide between private and public law and has been since *O’Reilly v Mackman* [1983] 2 AC 237. Prior to this case, ‘duties of legality, fairness and rationality were imposed in certain cases on private bodies taking private decisions’. Oliver cites, among others, *Nagle v Fielden* as examples of that<sup>545</sup>. Since *O’Reilly*,

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<sup>540</sup> Landgericht München, judgment dated February 26, 2014, file no. 37 O 28331/12

<sup>541</sup> Gardiner (n 80) 112.

<sup>542</sup> *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) C-415/93

<sup>543</sup> See McCutcheon (n 411) 37-72.

<sup>544</sup> The term is used here to denote the process as used in the English and Welsh jurisdiction and is discussed on the basis of applicability to decisions made under that jurisdiction by SGBs or such as the National Anti-Doping Panel (NADP), see <http://www.sportresolutions.co.uk/> (accessed on 25/09/13).

<sup>545</sup> Oliver (n 8) 80-81.

the test has been refined now to the point that to be judicially reviewed a decision must be of a ‘governmental’ nature not merely be part of a public function<sup>546</sup>.

There are certain inalienable constitutional rights that have hitherto been protected in judgments made outside judicial review proceedings. For example, the ‘right to work’ coupled with a capricious or arbitrary rejection of an application for a training licence was sufficient to establish liability in *Nagle v Fielden* [1966] 2 QB 633. Lord Denning found the systematic refusal of licences to women to be in restraint of trade. The fact that the SGB concerned, the Jockey Club, operated as a monopoly was key to that finding. The ‘right to a fair trial’ (*audi alteram partem*) is also a fundamental constitutional right in English Law and long predates the modern incarnation of human rights. Since *Ridge v Baldwin* [1964] AC 40, the type of hearing that right may apply to has been extended to those in which the *effect* of a decision is judicial. This is irrespective of whether the tribunal in question is operating in an executive or administrative capacity. This can be seen in a sporting context in *Russell v Duke of Norfolk* [1949] 1 ALL ER 109, a case again involving licences to train race horses<sup>547</sup>. In any event, according to Lord Loreburn in *Board of Education v Rice* [1911] AC179 ‘anyone who decides anything’ is obligated to apply the principles of natural justice.

The question remains as to whether an arbitral award could be challenged on human rights grounds. In *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 [2006] ISLR, SLR-30; (2006) ACD 2 it was, however, held that the test for amenability to judicial review under Part 54 of the Civil Procedure Rules, is essentially the same as the test for a ‘functional public authority’ under S6 Human Rights Act 1998. For Gordon, ‘whether the courts define a ‘public authority’ under s.6 [HRA] broadly or narrowly’ is key<sup>548</sup>. In *Poplar HARCA v Donaghue* [2001] 4 ALL ER 604, (paras 58 – 60), Lord Woolf stated that ‘...the courts have acknowledged the need for the definition of a public authority to be given a generous interpretation’<sup>549</sup>. For Boyes,

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<sup>546</sup> See *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 and *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909

<sup>547</sup> Gardiner (n 80) 193-194.

<sup>548</sup> Richard Gordon, *Judicial Review in the New Millennium*, (London: Sweet and Maxwell 2003) 21.

<sup>549</sup> *Ibid.*

bodies governing sport are considered to be private<sup>550</sup>, generally taking the form of incorporated or unincorporated associations<sup>551</sup> and the courts are prepared to move beyond the traditional notion of the contractual nexus in order to provide a remedy, but only in exceptional circumstances<sup>552</sup>. This approach was taken in *Nagle*<sup>553</sup> where the ‘right’ to earn a living was at stake for the claimant and in *Finnigan v. NZRFU (No. 1)*<sup>554</sup>, a case where the sending of a team to tour South Africa during the apartheid era was challenged. In other words, Boyes argues, significant political or geo-political issues must be under consideration.

The only way that a sports arbitral award might be susceptible to a human rights challenge then is if there is indeed a greater possibility that an SGB could be construed a public body for the purposes of a human rights challenge, as compared to an application for judicial review. Oliver’s argument that the old public versus private debate is redundant is persuasive. Oliver suggests that ‘there are many areas where laws which might be regarded as ‘public’ mingle with private law’<sup>555</sup>. She takes the theme further in exploring ‘five values which...are commonly protected by both public and private law, namely individual dignity, autonomy, respect, status and security’<sup>556</sup>. Oliver goes as far as to cite Klare in saying ‘there is *no* public-private distinction’<sup>557</sup>. In fact, before *O’Reilly v Mackman* [1983] 2 AC 237 there was no such divide, courts felt obliged to assess the legality, fairness, and rationality of private bodies taking private decisions as well<sup>558</sup>. Decisions now seem to indicate there is still such a public/private split, but that said, rights protected by public law, such as propriety and rationality in decision making, cited in the *GCHQ* case, are evident in private law as well<sup>559</sup>. Other examples include the requirements of procedural fairness and reasonableness on the part of the employer in making dismissal

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<sup>550</sup> Simon Boyes, ‘The Regulation of Sport and the Impact of the Human Rights Act 1998’ (2000), 6(4) EPL 517-518.

<sup>551</sup> Michael Beloff, ‘Pitch, rink, pool ... court? Judicial Review in the Sporting World’ (1989) *Public Law* 96.

<sup>552</sup> Boyes (n 550) 518.

<sup>553</sup> *Nagle v. Fielden* [1966] 1 All E.R. 689, 700.

<sup>554</sup> *Finnigan v New Zealand Rugby Football Union (No 1)* [1985] 2 NZLR 159

<sup>555</sup> Oliver (n 8) 27.

<sup>556</sup> *Ibid.*, 29, 60-70.

<sup>557</sup> *Ibid.*, 248.

<sup>558</sup> *Ibid.*, 81.

<sup>559</sup> *Ibid.*, 84.



decisions<sup>560</sup>. In *Stevenage Borough Football Club Ltd v Football League Ltd* (1996) Times, 1 August, the club sought to challenge the criteria for promotion to the third division, a remedy was refused on the basis of delay and prejudice to third parties, but Carwarth saw ‘no reason why the tests applied to the exercise of discretion by regulatory bodies should be materially different from those applied to bodies subject to judicial review’<sup>561</sup>.

Turning specifically to human rights, Oliver notes that some cases under the convention have raised issues to do with the breaches of fundamental rights by private bodies such as the ‘closed shop case’ of *Young, James, and Webster v UK* (1981) 4 EHRR 38, Oliver is of the view that, as for Philipson, over time the courts will develop the common law incrementally without creating new causes of action<sup>562</sup>. In this way then private law actions would have to be decided with reference to due process, human rights, and natural justice in the same way as public law litigation. Since this chapter was initially written, there does seem to have been some jurisprudence which is in accordance with Oliver’s ideas. In *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 the case did involve a public body, HM Treasury, but was not a human rights claim. Nevertheless, the right to a fair trial was a central plank of the arguments as to whether a closed hearing, where only one party is present, would infringe the ECHR/HRA principle, or indeed the common law right, to a fair trial.

Turning away from the public/private debate for a moment, the remaining alternative for an action against an SGB on human rights grounds is under the principle of indirect ‘horizontal effect’, whereby given that courts are ‘public authorities’, they must act in a way which is compatible with the HRA. For Phillipson, it is clear that s3 HRA requires all legislation to be interpreted in a way which is compatible with the convention. What is not clear though is the extent to which this applies to the common law<sup>563</sup>. Indirect horizontal effect may apply however if a private law action were brought alleging a breach of a convention right in, say, a breach of contract. In this context that breach could be a breach of an implied term to ensure a ‘fair (disciplinary) trial’ in the contract between an equestrian athlete and the FEI. Bamforth,

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<sup>560</sup> *Ibid.*, 146.

<sup>561</sup> *Ibid.*, 211.

<sup>562</sup> *Ibid.*, 241.

<sup>563</sup> Gavin Phillipson, ‘The Human Rights Act, ‘Horizontal Effect’ and the Common Law: a Bang or a Whimper?’ (1999) MLR Vol 62 824-825.

however, doubted that horizontal effect would have any great force in practice, not least because the Act makes no clear sanction available against a court for failure to act in accordance with convention rights<sup>564</sup>. Thus far, Bamforth's views appear to have been borne out by the fact that there has not been any great swathe of cases utilising the horizontal effect to bring an action against non-public bodies and individuals since 2000.

Even if a human rights challenge to an SGB like the FEI or BHA were possible on the basis that it carried out a public function, or utilising horizontal effect, the main obstacle thereafter could be that of judicial deference: The tendency of the judiciary to bow to the expertise of the body or person making the original decision. Edwards argues that this principle, justified by the lack of democratic legitimacy of the judiciary and the 'institutional incompetence' of the courts to deal with the socio-economic issues which frequently arise, is a 'firmly established feature of judicial review in cases involving the HRA<sup>565</sup>'. He concludes by saying that judicial deference is so entrenched it is in danger of frustrating one of the basic purposes of the act – 'bringing rights home'<sup>566</sup>.

Given all of the foregoing, a private law claim remains the strongest possibility for the aggrieved equestrian or jockey like any sportsperson. However, generally the decisions of English courts in such cases have tended to recognise the specific expertise that a disciplinary panel in an SGB has. Cases like *R (Mullins) v Appeal Board of the Jockey Club* lead to the conclusion that, although there are exceptions, the courts prefer to leave the enforcement of the rules of sport in the hands of the expert bodies set up for their regulation. Intervention is only likely, and then reluctantly, when there is something demonstrably wrong with the process or outcome.

At time of writing, the latest potential challenge to an SGB in a domestic court in the UK in the equine sector has arisen out of the *Jim Best* case encountered in Chapter 5. The BHA Appeal Board upheld *Best's* allegation of potential bias at the original hearing because one member also

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<sup>564</sup> N. Bamforth, 'The true 'horizontal effect' of the Human Rights Act 1998' (2001) *L.Q.R.* 117(Jan), 38-39.

<sup>565</sup> R. Edwards, 'Judicial Deference Under the Human Rights Act' (2002), *MLR*, Vol 65, 859.

<sup>566</sup> *Ibid.* 882.

separately was a paid consultant of the BHA<sup>567</sup>. The BHA swiftly responded by engaging Christopher Quinlan QC to conduct a review which entailed an analysis of whether convention principles such as the right to a fair trial, and older constitutional principles such as the rule against bias, were ensured by the Orders and Rules of Racing<sup>568</sup>. It is evident therefore that the BHA themselves were alive to the potential vulnerability of their regulatory regime to a challenge under the *Bradley v Jockey Club* principles not to mention the possibility of human rights forming part of any such private law claim<sup>569</sup>.

In summary, the foregoing proves that there is now a much greater likelihood of a successful challenge to any SGB or IF by a sports participant in the UK domestic courts than might have once been the case. This underlines the need for the forthcoming discussion as to specific areas of vulnerability in rules pertaining to horse athletes that rely on strict liability, reverse burdens and the like.

#### 6.4 The case of *Vanhoeve and Lobster* 43

This is a case study which is based on a breach of the FEI's Controlled Medication Rules (CMRs)<sup>570</sup>, part of the overall anti-doping document the EADCMR already discussed. The issues raised here are in large part transferrable in principle to any anti-doping rules for equines that utilise strict



**Figure 8 - Abdullah Waleed Sharbatly (extreme right) receiving his Show Jumping Team bronze medal at London 2012, 'Davos', his ultimate mount, can be seen behind.**

<sup>567</sup> 'Jim Best may seek High Court ruling over rehearing dispute with BHA', (London: Guardian Online 8 August 2016) <https://www.theguardian.com/sport/2016/aug/28/jim-best-high-court-ruling-rehearing-bha> accessed on 20th October 2016.

<sup>568</sup> Quinlan Review, Terms of Reference 2016 available at: <http://www.britishhorseracing.com/wp-content/uploads/2016/06/TERMS-OF-REFERENCE-Review-of-DP-AB-and-LC-01-06-16.pdf> (accessed on 20/10/16)

<sup>569</sup> Merritt (n 127) 206.

<sup>570</sup> EADCMRs para 1.1.

liability and reverse burdens of proof. International show jumpers Sharbatly and Al Eid were charged because of the presence of phenylbutazone and oxyphenbutazone, both commonly known as “bute”, in *Vanhoeve* and *Lobster 43* without an Equine Therapeutic Use Exemption (ETUE). The tests were carried out during events earlier in 2012. Under the EADCMRs, a “Person Responsible” would include an athlete who rides a horse during an event<sup>571</sup>. Al Eid and Sharbatly were brought before an FEI Tribunal which held an oral hearing on 18<sup>th</sup> and 19<sup>th</sup> April 2012 and handed down a decision on 23<sup>rd</sup> May. Each appellant received a period of ineligibility of eight months which effectively precluding their involvement in the 2012 London Olympics. A single CAS arbitrator heard an expedited appeal in London with a decision announced on 11<sup>th</sup> June 2012. The arbitrator found that the FEI Tribunal ‘conflated the sanctioning principles set out in the Equine Anti-Doping Rules with those applicable under the Equine Controlled Medication Rules, with the result that an excessive sanction was applied’<sup>572</sup> (see also Appendix 1). The sanctions were replaced with periods of two months’ ineligibility for each of the appellants allowing the possibility of selection to represent the Kingdom of Saudi Arabia at the London 2012 Games (see Fig. 8).

The outcomes of the Sharbatly and Al Eid cases are analogous to a criminal case where a conditional discharge is considered the most appropriate sentence. The accused is found guilty as charged but, because of various mitigating circumstances, they receive a punishment which allows them to get on with their daily lives. In that analogy, of course, the accused would receive a stain on their character and would have a criminal record, so it is with Sharbatly and Al Eid. They are ‘guilty’ persons and, quite apart from any moral stigma, previous ‘convictions’ of this nature affect the way that future transgressions of FEI rules are ‘tried’. For example, under the EADCMRs a person with a ‘record’ for substance misuse of this nature would not be able to elect to have the allegations against them heard under the administrative procedure, also referred to as the ‘fast track’ in the rules. Under Article 8.3.1 the fast track can only be used if there has been no controlled medication violation in the previous eight years, there was only one

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<sup>571</sup> FEI General Regulations, Art. 118, available from <http://www.fei.org> (accessed on 04/08/13).

<sup>572</sup> CAS 2012/A/2807 *Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale*/CAS 2012/A/2808 *Abdullah Waleed Sharbatly v. Fédération Equestre Internationale* at para 1.12.

controlled medication substance found in the current sample and the event during which the sample was taken was not the Olympic, Paralympic or World Equestrian Games<sup>573</sup>.

There is the fact that the sanction can be eliminated or mitigated under the provisions of Article 10 in relation to a finding of no fault or negligence or no significant fault or negligence<sup>574</sup>. There is again an analogy with a magistrates' court finding of guilty, but because of mitigation imposing a less significant sentence (such as a suspended one) on the accused. The fact remains that such a person this court applied sanction may well risk losing, or being unable to gain, paid employment and of suffering a social stigma.

A study particularly of Sharbatly's defence in this case raises concerns around human rights, natural justice and due process in equine cases. These concerns focus on strict liability and rules of evidence, especially reverse burdens of proof. This is especially given that this research has already proven that an action containing strands of convention principles is entirely possible notwithstanding the fact that an SGB is a private body then Article 6 of the ECHR/HRA 1998 is highly relevant.

#### **6.4.1 Reverse burdens in the *Sharbatly* and *Al Eid* case**

It should be emphasised again that these cases involved the Controlled Medication Rules Articles in the EADCMRs not the EAD ones that (unhelpfully) bear the same or similar article numbering.

Neither Sharbatly nor Al Eid disputed the nature of the substance nor the positive result the samples gave. Al Eid contended that the 'bute' found in *Vanhoeve's* sample was the result of 'inadvertent ingestion of powdered bute that was present at the [International Riding School] stables, and most probably in *Vanhoeve's* stable, because the stable and wall-mounted feed bucket had not been cleared prior to *Vanhoeve's* arrival and nor had the stable yard as a whole'. Al Eid denied any deliberate administration of the substance, being supported in that assertion by Dr. Philippe Benoit, the Saudi equestrian team veterinarian. In addition, an expert witness

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<sup>573</sup> EADCMRs, Article 8.3.1 available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 12/09/12)

<sup>574</sup> *Ibid.* Article 10.4.1/10.4.2

employed by Al Eid confirmed that this was a plausible explanation<sup>575</sup>. To place a previous point in context, consideration of this evidence would have required just as much time and expense by both parties, had it been attached to the finding of guilt or innocence itself rather than the sanction. As no further resources would have been needed, this rebuts a major theme in the pro-strict liability argument.

Sharbatly in turn accepted that, ‘for the purposes of Article 10.4.1 of the ECM Rules, he [could not] establish how the substances entered into *Lobster 43*’s system’<sup>576</sup>. Sharbatly and Dr Benoit asserted that, given the care that they and the Saudi equestrian team used in complying with the EADCMRs, the only possibilities were contamination or sabotage. Contamination was confirmed as a plausible explanation by the same expert witness as used by Al Eid who further noted that:

‘the estimated level of Phenylbutazone in the A Sample from *Lobster 43* was only 12ng/ml (or 12%) above the FEI Reporting Level of 100ng/ml....the estimated concentrations of Phenylbutazone and Oxyphenbutazone in the A Sample was very low in comparison with the levels more commonly encountered in positive post-competition and post-race drug surveillance samples’<sup>577</sup>.

Al Eid relied upon Article 10.4 of the ECM Rules covering elimination or reduction of a period of ineligibility justified by ‘exceptional circumstances’ based on a finding of ‘no fault or negligence’ on the part of the accused person. This is analogous to a criminal trial where an accused pleads guilty, but disputes the facts as presented by the prosecution, usually because the defendant’s version of events, if accepted, could lead to a reduced sentence. Such a dispute in a criminal trial would be settled by means of a so-called *Newton* hearing<sup>578</sup>. This can arise if a substantially different version of events is given to a probation officer while a pre-sentence report is being compiled.

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<sup>575</sup> CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale, Paras 3.11-3.14.

<sup>576</sup> *Ibid.* 3.26

<sup>577</sup> *Ibid.* 3.29

<sup>578</sup> *R v Newton* (1983) 77 Cr. App. R. 13

At the time of the hearing just before the 2012 Games, in controlled medication cases, if the sample from the horse tests positive for a controlled medication the accused has to plead guilty because of the strict liability principle. If they then contend ‘no fault or negligence’ under Article 10.4.1 CMRs then the wording stipulated:

‘If the Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Fault or Negligence for the ECM Rule violation, the otherwise applicable period of Ineligibility and other Sanctions may be eliminated...’.

In order to be successful, the person responsible or member of support personnel:

‘... must also establish how the Controlled Medication Substance entered the Horse’s system in order to have the period of Ineligibility and other Sanctions eliminated.’<sup>579</sup>

The wording remains the same after the January 2013 revisions so a full reverse burden still rests on an accused person. Article 10.4.2 CMRs allows for a reduced sanction if no significant fault or negligence is ‘established’ by the accused. It should be noted that automatic disqualification of individual results can never be eliminated once an ECM (or EAD) violation is found. So any award, up to and including an Olympic gold medal, could still be forfeited on the basis of an error of judgment by, say, a stable hand, thousands of miles away from the sportsperson accused.

In a criminal trial *Newton* hearing the judge, sitting alone, is a finder of fact and the burdens and standards of proof are exactly as they are in a criminal trial, the burden is on the prosecution to prove their version of events so that the judge is ‘sure’ they are true. In a controlled medication case, as Al Eid found, the requirement for the accused to ‘establish’ that they bear no fault or negligence means that they must prove they did not have the equivalent of the criminal concept of *mens rea*. Furthermore, the requirement to ‘establish’ how the controlled medication entered the horse’s system must also be construed as a full burden of proof falling upon the accused.

Al Eid and Sharbatly were successful in having their bans reduced on the basis that the first instance tribunal ‘conflated the sanctioning principles set out in the Equine Anti-Doping Rules

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<sup>579</sup> Article 10.4.1 CMRs available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 15/08/13).

with those applicable under the ECM Rules [CMRs]<sup>580</sup>. Notwithstanding this outcome, it remains that the EADCMRs as drafted are seriously flawed in that they are confusing and inconsistent. They also contain reverse burdens of proof and standards of proof which would not stand up to scrutiny when considered in the light of Article 6(2) ECHR whether that be in a direct human rights claim or as a strand of a private law claim.

#### **6.4.2 Strict liability – a transplant which should have been rejected by the host?**

Any detailed consideration of how the foregoing arguments, or versions of them, might be applied to human athlete only sports is outside the scope of this research. This study is about how, under the *status quo*, the *human* athlete might suffer an injustice if there is an adverse analytical finding in relation to the *non-human* athlete team member. This in turn undermines faith in the system's ability to catch 'real' cheats. Therefore, there should now be a discussion of why horse sport has chosen to adopt the same principles and structures for non-human athletes as are in place for human athletes across most of the sporting world. Furthermore, why it did not develop its own rules that were a better fit for horses and therefore also for equestrians, jockeys and trainers. This discourse should be borne in mind when considering the next section which explores why, having adopted modified strict liability, no fundamental criticism of it is brooked by sports' 'rulers'.

In comparative law, there is the 'theory of legal transplantation'. For such as Savigny, Hegel, Marx, and Montesquieu, law should be specific to the cultures, customs, manners, economy, beliefs, and degree of liberty of the group of people that are to be subject to it. Montesquieu writes that the law of each nation 'should be so closely tailored to the people for whom they are made, that it would be pure chance...if the laws of one nation could meet the needs of another'<sup>581</sup>. Yet for Ewald, critiquing Alan Watson, such 'mirror' theories (law mirrors society)<sup>582</sup> have a 'long and distinguished history', but are now being challenged by the theory of

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<sup>580</sup> CAS 2012/A/2807 *Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale*/CAS 2012/A/2808 *Abdullah Waleed Sharbatly v. Fédération Equestre Internationale*.

<sup>581</sup> Charles De Secondat Montesquieu, *De l'esprit de loi*, book I, ch. 3, (De lois positives) (1748)

<sup>582</sup> William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants'(1995) *The American Journal of Comparative Law*, Vol. 43, No. 4, 492.



legal transplantation<sup>583</sup>. For Berkowitz, Pistor, and Richard there are many clear examples of legal transplantation. During the period 1890-1914, 'French law was transplanted throughout Europe and western law (especially French and English law) was exported throughout Latin America, Asia, and Africa...post-Second World War, many newly independent states once again borrowed legal code from major western powers'<sup>584</sup>. The hosts of these transplants have gone their own way in some circumstances, and in limited areas, to allow for local social and cultural constructs. Examples include the retention of the death penalty in Jamaica and the remaining criminalisation there of homosexual acts. These are both despite the legal system having close enough similarity with that of its former colonial masters to allow a right of appeal to the UK Judicial Committee of the Privy Council.

It is useful to see this as an analysis of how the equine sports world has adopted, almost wholesale, regulatory provisions created for human athletes. It is not the case that integrity rules have developed in response to the needs of the equestrian and horse racing community. The horse racing industry has developed a code of rules, the Orders and Rules of Racing, independently of other sports which latterly adopted the WADA Code. That said fundamental elements of the code, such as strict liability have been transplanted into the BHA Rules<sup>585</sup>. It is also true that the Orders and Rules of Racing cover a great deal more than the WADA Code does, including what are effectively licensing and employment conditions, the alleged unwieldiness of which this research will return to. Nevertheless, the core principles of presumed fault are present in both code-based systems and the BHA's current rules. Furthermore, both of these sets of rules rely on technical detailed provisions, and are to be interpreted literally, which rests heavily on the legal tradition of common law countries. The contrast between this and a purposive approach to interpretation of a set of integrity principles will be considered in detail later in this thesis.

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<sup>583</sup> *Ibid.*, 493.

<sup>584</sup> Daniel Berkowitz et al. 'Economic development, legality, and the transplant effect' (2003) *European Economic Review*, Volume 47, Issue 1, p165.

<sup>585</sup> *Mullins* (20/08/04) BHA Disciplinary Appeal Hearings, available at <http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/disciplinary/?result=535a2fbab33ebfaa5320e9b2> (accessed on 04/06/15).

Montesquieu contends that it would be absolute chance – *un grand hazard* – for the laws of one nation to meet the needs of another. This chance has been taken with equine sport, but it has not paid off. The foregoing arguments have demonstrated the fallacy of adopting existing regulatory arrangements for humans and transplanting them to be applied to horse athletes. The result is the unacceptably high possibility of injustice that has been demonstrated in this research. This is an incompatible system which should trigger the immune system of equine sport to reject it.

The fundamental unfairness of the provisions discussed is thrown into even starker relief when it is considered that despite them the sports establishment cleaves so steadfastly to strict liability.

‘[W]e cannot, without blinding reason and cause, move one millimetre from strict liability...’<sup>586</sup>

typifies the attitude. This research will consider next why that unquestioning adherence to an ideology might be so common.

## **6.5 Sport’s ruling elite and the *status quo***

For Althusser, Marx may have founded a new science, namely the ‘science of the history of social formations’<sup>587</sup>. Notably, this is wider than the science of the history of state formations and thus is applicable to social formations of many types, with prime examples including sports governing bodies and international federations. In the introduction, it was discussed how sports governance can be analysed in the same way as corporate governance, and Burrell and Morgan’s *radical humanist* paradigm, owing much to Gramsci’s ideas, was deemed most likely to produce the kind of fundamental re-analysis that needed for sports governance in the equine sporting sector.

For Carey, ‘professional organisations (sport or otherwise) are subject to the logics of capitalist hegemony...[f]rom a Gramscian perspective, the organisation thereby acts as one of many pedagogical or cultural institutions responsible for the articulation and reinforcement of dominant ideologies’<sup>588</sup>. This is primarily discussed as one of the institutions in a state which helps to reinforce the dominant ideology of the state. In doing so, and by replicating the state-wide ideology internally, sports governing bodies imitate the hegemony of the state, and thus are

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<sup>586</sup> Coe (n 58). See also Houben (n 58) p10.

<sup>587</sup> Louis Althusser, *Montesquieu, Rousseau, Marx – Politics and History*, (London: Verso 1982) 166

<sup>588</sup> Karen and Washington (n 23) 365.

miniature versions of the political and legal structures that surround them. One of the ways that sports governing bodies reinforce dominant ideologies – in this specific case, the unquestioning faith in strict liability – is to prefer an ‘architecture of simplicity’ and by striving to appear ‘congruent with legitimate or common sense norms and values’<sup>589</sup>. Consequently, modified strict liability is presented as acceptable because the necessary evil of occasional injustice is also tolerated in the criminal law, and is therefore a ‘norm’ requiring no further analysis and inviting no debate. This is the view of code compliant sports and the BHA has simply followed suit.

For Joll, a successful ruling class is one that has long established intellectual and moral leadership<sup>590</sup>. Although the ‘age of deference’ is fast disappearing in the historical rear view mirror, there is still a tendency to construct those in high social positions as possessing moral and intellectual leadership, in the introduction it was noted how many members of the IOC and equestrian IFs are drawn from aristocracy, Princess Haya and Princess Anne being perhaps most notable. The historical links that horse sport has with the propertied and monied classes throughout history has been discussed in this research, as well as the horse’s contribution to industrial wealth creation before the age of motor vehicles. This was part of the changing social constructs discourse found in Chapter 4. The preponderance of appeal court judges and senior legal figures at the appeal level for the BHA was also commented upon when discussing the lack of coherence across the equine SGBs disciplinary arrangements. Thus, the ruling elite of horse sport in particular has been able to carry a level of presumed moral and intellectual leadership from their influential position and/or association with influential people in wider capitalist society. The accepted view on doping based on this leadership is evident in this quote from Juan Antonio Samaranch:

‘Doping equals death...also the death of the spirit and intellect, by the acceptance of cheating. And finally, moral death, by placing oneself outside the rules of conduct demanded by any human society’<sup>591</sup>.

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<sup>589</sup> *Ibid.*, 365-366.

<sup>590</sup> Joll (n 88) 100.

<sup>591</sup> Anderson (n 102) 1.

Comments in similar vein have been heard from leading lights of the equestrian establishment as well, despite neither acknowledging that no distinction is made between the serial cheat at one end of the continuum and the ill-informed or unlucky at the other extreme. Hickey stated this:

‘...I was asked before coming to Beijing what my wish for these Games was and I answered that it would be Ireland going through the three weeks without being tainted by any hint of doping... We have to get answers. The Irish Sports Council is responsible for the testing of athletes and they do a very good job of it. Procedures are followed rigorously. We want the same standards to apply to equestrian sports and, right now, that doesn’t seem the case’<sup>592</sup>.

The implication that all doping is cheating was clear and Hickey was referring to what fellow IOC members were calling a ‘scandal’, but was in fact the mistaken use of a liniment on horses that contained chilli pepper extract, a point that this research will return to later on.

This research has proceeded throughout on the basis that power, including the power exercised by SGBs and IFs over sports participant, is a subjective concept. For Reisner, ‘[t]he psychological nature of manifestation of power is so obvious, and... only exists in the human psyche, is so lacking in materials characteristics... which only materialises in real terms to the extent that people make it the principle governing their behaviour’<sup>593</sup>. However, for Pashukanis, the objective effect of the latter part of this sentence must not be minimised<sup>594</sup> and in sporting terms the fact that athletes submit to the integrity regulations as they currently stand is such an objective reality with real consequences. The question then arises as to why the *status quo* is so universally accepted without question when it is at best a very blunt tool for addressing cheating. For Jessop, writing about Poulantzas, hegemony secures the active consent of the dominated classes as well as unifying dominant class actors and groups into a coherent power bloc<sup>595</sup>. This explains the BHA’s unquestioning acceptance of strict liability with the ‘doping equals cheating’ subtext implicit within it simply because of CAS’ stance on the matter.

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<sup>592</sup> Reuters News Agency available at: <http://www.reuters.com/article/2008/08/23/us-olympics-equestrian-ireland-idUSPEK30997520080823> (accessed on 16/07/15).

<sup>593</sup> Mikhail Reisner, *The State (Gosudarstvo)*, 2<sup>nd</sup> ed., (Moscow 1918), Part I, 35.

<sup>594</sup> Evgeny Pashukanis, *Law and Marxism: A General Theory*, (London: Pluto Press 1983) 75.

<sup>595</sup> Jessop (n 86) 155.

There are twin pillars to Gramsci's concept of hegemony, 'active consent articulated with constitutionalised forms of coercion' and Jessop goes on to refer to Gramsci's 'hegemony armoured by coercion'<sup>596</sup>. Gramsci himself writes that dominant social groups dominate antagonistic groups, liquidating or subjugating them<sup>597</sup> many times by repeating doctrine often enough and with enough conviction that the ruled accept the doctrine as 'natural' and that it could not be otherwise<sup>598</sup>. To apply this to sport, it is very difficult to find many outside academia who would openly challenge Coe's 'we cannot...move one millimetre from strict liability' ethos. Gramsci noted that the rulers have far greater control over the sources of information which might support or otherwise their conception of the world:

The industrial and landowning bourgeoisie possesses thousands and thousands of newspapers and printing presses...the proletarians can only print a very few newspapers with their own resources<sup>599</sup>.

The same is true of the SGBs and IFs. With their powerful and well-connected members, they have the websites and the links to friendly journalists, editors, and broadcasters. Their message about the inevitability and unassailability of the *status quo* in the sports disciplinary arena is most easily accessed. The modern media landscape does allow for blogs and social media to be an outlet for athletes wanting change, but here too all the SGBs and IFs have a well-organised and crafted presence to counteract that. Despite funding problems, SGBs and IFs still have far greater resources generally than individual athletes and even sports unions. Just as the bourgeoisie of Gramsci's time possessed 'tens of thousands of meeting-halls, theatres and cinemas, where it [could] assemble its supporters peacefully and carry out all the propaganda it deem[ed] useful'<sup>600</sup>, so today the SGBs and IFs have the resources and structures needed to maintain their view of integrity management in the sporting world as paramount.

Actively campaigning against the strict liability principle is not in the best interests of the athlete as part of the 'ruled' therefore, as it gives the impression that this is condoning cheating, even if

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<sup>596</sup> *Ibid.*

<sup>597</sup> Gramsci (n 18) 57.

<sup>598</sup> *Ibid.*, 157.

<sup>599</sup> Quentin Hoare, *Antonio Gramsci – Selections from Political Writings* (1921-1926), London: Lawrence and Wishart 1978) 35.

<sup>600</sup> *Ibid.*

it is nothing of the sort. Furthermore, becoming a *professional* athlete can be a pipe dream in all but the major sports and many lower level sports participants have to balance work, their sport, and family life. This is hard enough and unlikely to allow time for or encourage taking on the establishment.

Finally, the coercion element of Gramsci's analysis is carried out by the sports disciplinary rules and their enforcement in tribunals and ultimately, if necessary, the state apparatus. Modified strict liability is utilised to ensure near certain conviction for all transgressors regardless of circumstances and even if mitigating factors are taken into account regarding the sanction this is small comfort to the convicted yet inadvertent doper. What is ensured is unquestioning 'acceptance by the ruled of a conception of the world which belongs to the rulers'<sup>601</sup>.

Commentators write of the attractiveness of strict liability to SGBs and IFs because of its simplicity<sup>602</sup> and this accords with the 'architecture of simplicity' preferred by the dominant classes to promote and maintain their power base in much wider, as well as sporting, contexts. This preference for simplicity is further shown by the arrival of presumed fault and that technical regulations are to be literally interpreted as a legal transplant as previously discussed. There existed in the outside world a series of legal notions and structures which perfectly fitted the needs of equine sport's ruling power bloc, and they readily accepted it.

There is then a clear motivation for SGBs and IFs to cling on to modified strict liability, or presumed fault as it is sometimes called. This is despite its dependence on unduly onerous reverse burdens and notwithstanding the serious and concerning inequities proven by this research. The link between the dominant power structures in wider capitalist societies and sports organisations in all sport is evident, but is perhaps at its most obvious in horse sport because of the historical and social antecedents particularly pertaining there.

## **6.6 Proving the point – a summary of the flaws**

This coherence of this research is heavily predicated on proving that there is a great deal that is fundamentally wrong with the disciplinary arrangements applicable to people who ride horses in

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<sup>601</sup> Berberoglu (n 323) 57.

<sup>602</sup> Soek (n 104) 151.

sport. This section is dedicated to summarising those floors to emphasise them before moving on to sections on why reviews of these sports integrity structures have thus far mostly been ineffective.

The preceding sections sought to expose the vulnerability and the fundamental unfairness of strict liability and reverse burdens in the WADA Code and sport-specific codes constructed in like vein. The sports that throw these issues into the sharpest relief are sports where the accused and the contaminated are not the same individual, or even the same species, and hence do not even possess the same level of autonomy. Although this debate is directly important for the FEI and BHA it is the case that many of the points could be taken up by research into human doping regulations. In other words, to re-open discussion with regard to all sports on the popular notion that strict liability and reverse burdens in doping are absolutely required in their current form and are not an unacceptable affront to justice.

The strands of argument in the preceding pages establishes that there are highly questionable aspects to the EADCMRs in terms of the fundamental rights of the equestrian athlete as affected by an adverse analytical finding in a non-human athlete team member. Without a fundamental overhaul based on a new *weltanschauung*, these principles are more likely than not to lead to basic injustice. Furthermore, parading the unwary or disorganised as convicted cheats for evidence of success in the fight against doping does nothing to enhance the image of sport, nor does it do anything to deter determined cheats or catch them.

Coincidentally, as a result of consultation carried out for the *Ljungqvist* Commission, the EADCMRs were updated while this research was being carried out and changes wholly in line with the arguments presented here about standards of proof at least were incorporated, proving the need for detailed analysis of the original wording. These changes have raised more questions than answers in some respects however, as this chapter so far has highlighted. In any event, the changes produced a dangerously confusing document. Little has been altered in relation to strict

liability (except that this no longer applies to support personnel accused<sup>603</sup>) and reverse burdens of proof.

The changes show however that the FEI is clearly alive to the possibility of challenge on procedural grounds. The obstacles to challenge on these grounds are considerable. The main argument in such a case would be whether or not the accused athlete would receive a fair trial. This would be on the basis that strict liability in equine cases and reverse burdens as currently constituted do not accord *inter alia* with the presumption of innocence. It also seems settled that strict liability is not at the moment considered to be a breach of Art. 6(2) ECHR *per se*, however a procedural challenge in the English courts is now a real possibility as evidenced by Oliver's work, the *Bank Mellat* decision and the haste with which the BHA sought to review its disciplinary arrangements in light of the *Jim Best* case and the recommendations of Christopher Quinlan QC.

The position is, however, less clear with reverse burdens. In English criminal law, the greater the implications for the defendant, the more likely a reverse burden will be 'read down' as being evidential in nature only. There is no doubting the potentially crippling effect on an athlete of an adverse doping or medication finding. This, therefore, would seem to suggest that applying ECHR reasoning through a private law claim, reverse burdens in sports integrity cases ought to be considered evidential only, instead of carrying a burden of proof as they currently do.

The trajectory that English law has taken is that there are no gradations between the civil and criminal standard of proof. Thus 'comfortable satisfaction' must be the same as 'beyond reasonable doubt', whatever the original intention. At the very least, this has implications that will be addressed under the *interface problem* discussion later. The key amendment of January 2013, the substitution of 'on the balance of probabilities' also begs the question as to why 'comfortable satisfaction' is still deemed suitable in the FEI's EAD and ADRHA regulations. As these are all based on the code it must suggest an argument that the code itself should not contain 'comfortable satisfaction' either as a standard of proof. In any event, in a *quasi*-criminal matter the burden of proof should be 'beyond reasonable doubt' for the enforcing authority. In addition,

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<sup>603</sup> Article 2.1 EAD and ECM Rules available from [www.feicleansport.org](http://www.feicleansport.org) (accessed on 19/08/13) See also <http://www.feicleansport.org/faqs.html#link5> (accessed on 19/08/13).



there is the danger of a lack of a fair trial through an unjustified application of strict modified strict liability and so the decision handed down could be construed an ‘arbitrary’ one. This could make it an unreasonable interference with an athlete’s ‘common law’ right to work as well as a human-rights based private law claim.

The unquestioning obedience of SGBs, ISFs, and athletes to the modified strict liability principles continues however, and a consideration of this phenomenon in this research is needed for two reasons. Firstly, it explains why the structures outlined in the discussion of sports governance and *lex sportiva* earlier are prone to mimic the capitalist state within which they arise. This has happened by a form of legal transplantation found as a key theory in comparative law, which is transplantation that is to be regretted. A Gramscian analysis is vital in this understanding as it explains why what would otherwise be tautological reasoning; ‘strict liability is good because it is good/other SGBs use it’, goes unchallenged. Secondly, the research moves on now to a new phase, having considered the inequities in the current system in horse sport. The research will look at which reforms to address these inequities might be both desirable and likely to succeed in practice. In doing so it is equally important to consider how the sports have attempted to reform themselves within the foregoing frame of reference. Further, to identify the categories into which actual past and proposed reforms best fit. Up to now, they have essentially come from sport’s dominant class ‘tendency to change ‘...men and programmes’ yet reabsorb ‘the control that was slipping from its grasp’, retaining and reinforcing power’<sup>604</sup>. This is to be regretted, but there are now practical and forward-thinking proposals which can be built upon by this research.

The latter ideas are the focus of the next chapter, but it will also be necessary to consider which improvements would not only work better, but also be most acceptable to the ‘rulers’. The ‘rulers’ must be persuaded while challenging the hegemony of the structures and rules in place, and the dominant sporting elite’s conception of the world, a twin thrust which will not be easy.

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<sup>604</sup> Gramsci and Forgacs (n 294) 218.

## 6.7 Reviews – ‘everything changes, nothing perishes’

In large part, the lack of demonstrable fundamental fairness flows from an unquestioning obedience to the concept of strict liability/presumed fault. The different anti-doping regulations pertaining to horse-based sport sit within a governance structure which is also itself fundamentally flawed. The regulatory regime as a whole exhibits so many fractures that it must be considered dysfunctional. Therefore, at this stage in the thesis a preliminary conclusion might be that horses exist in a state of general regulatory limbo. Even the most basic of surveys are hindered by the fact that even counting the number of horses in Europe is not possible with any degree of accuracy<sup>605</sup>. There is, in fact, an analogy with the way Foucault correlates the ability of the state to count its citizens with its ability to regulate and categorise them<sup>606</sup>, the ability of the state to count horses remains severely constrained by that regulatory limbo.

With the foregoing in mind, the next stage in this research is to analyse the nature and extent of any serious attempts at reviews of any part of the governance *status quo* in respect of equine based sports.

### 6.7.1 Princess Haya’s ‘New Leaf’

The FEI projects a clear image of a desire to set its house in order. The office of the previous president of the FEI, Princess Haya issued a press release in response to various doping scandals already playing out by 2009. This recognised that to ‘guarantee its community a clean and uncorrupt product’ the ‘negligence’ of the FEI would have to be addressed.<sup>607</sup> This contrite statement was probably inevitable following the findings of The *Stevens* Commission and the *Ljungqvist* Commission. The *Ljungqvist* Commission had the broadest remit and the *Stevens* Commission was set up to dovetail with the work of Professor *Ljungqvist*’s team. It had a diagnostic or investigatory role and their respective functions are discussed further below.

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<sup>605</sup> Evans, R., & Vial, C. (eds.) (2016) *The New Equine Economy in the 21<sup>st</sup> Century*, Netherlands: Wageningen Academic Press, p19.

<sup>606</sup> Foucault, M. (1977) *Discipline and Punish*, London: Penguin, pp195-199.

<sup>607</sup> FEI Press Release: [http://www.prweb.com/releases/FEI\\_Equestrian/Lord\\_Stevens/prweb2824784.htm](http://www.prweb.com/releases/FEI_Equestrian/Lord_Stevens/prweb2824784.htm) (Accessed on 12/07/2015)

## 6.7.2 The Ljungqvist Commission

The head of this reporting body, Professor *Arne Gunnar Gunnarsson Ljungqvist* is a former Olympic athlete who competed for his home country of Sweden at the 1952 Helsinki Games. He was not, however, an equestrian<sup>608</sup>. For Wendt, after the second Olympiad in which there were prominent equestrian scandals, the 2008 Beijing/Hong Kong Games, the FEI took a ‘two pronged’ approach, the creation of the ‘...“The Stevens Commission” led by the former London Metropolitan Police Commissioner, to investigate allegations about the German equestrian team’s use of illegal drugs...and make recommendations for drug testing protocols and for overall security<sup>609</sup>’. The second ‘prong’ was what is properly called the Commission on Medication and Doping which came to be known as the *Ljungqvist* Commission. For Wendt, the rationale for establishing this commission was that there were several independent contributors to the FEI’s predicament. These included confusion about what is doping and legitimate medication, FEI internal structures, and those at national federation level, and solutions needed to be ‘holistic’<sup>610</sup>. The commissions are referred to collectively as the Clean Sport Commission and the major result of their work is the implementation of the EADCMRs. On their launch, these improved regulations and structures were heralded as a new era for the sport with much enthusiasm from those tasked with governing it, for example the then FEI secretary general Alex McLin:

‘Today marks the culmination of a collective effort by the entire equestrian community to protect the integrity of our sport and the welfare of our horses.’<sup>611</sup>

For Wendt, again ‘[t]he FEI Clean Sport Initiative...seems to have had a significant impact’<sup>612</sup> and ‘[u]nder its current president, HRH Princess Haya Al Hussein, the FEI has made tremendous

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<sup>608</sup> He is a distinguished medic and academician and he was President of the Swedish Sports Confederation from 1989 to 2001 and both Vice President and Chair of the IAAF Medical Commission from the early 1980s. He has been a member of WADA since 1989 and is a Member and Chairman of the Medical Commission of the IOC, he holds both an MD and a PhD, see Tamburrini, C., & Torbjörn, T. (Eds) (2005) *Genetic Technology and Sport: Ethical Questions*, London: Routledge.

<sup>609</sup> Wendt (n 129) 71.

<sup>610</sup> *Ibid.*

<sup>611</sup> ‘The Horse: Your Guide to Equine Healthcare’ available at: [www.thehorse.com/articles/25323/fei-equine-anti-doping-and-controlled-medication-regulations-and-prohibited-substances-list-goes-live](http://www.thehorse.com/articles/25323/fei-equine-anti-doping-and-controlled-medication-regulations-and-prohibited-substances-list-goes-live) (accessed on 13/07/15).

<sup>612</sup> Wendt (129) 75.

strides not only as an organisation but also in anti-doping efforts in recent years<sup>613</sup>. In his somewhat uncritical account of the transformations, Wendt is basically applauding stricter controls and clearer demarcations between medication and doping. It may be that the 1,200 substances including definition, common usage, and most popular tradenames that are on the Prohibited Substances Database make life easier for veterinarians. It is never explained, however, how this is much of an assistance to human athletes and support personnel. The need to be aware of, and up to date with, this information is a major hurdle for any competitor. The then chairman of the FEI Veterinary Committee, John McEwan, supported the changes when interviewed in 2009<sup>614</sup>. It must be remembered however, that any revisions have happened within a very familiar framework, and that they do little more than bring equestrian sport more into line with sports involving only human athletes.

For Wendt, the need for transparency and to encourage input from all equestrian stakeholders was paramount<sup>615</sup>. There would be little ‘buy-in’ from the equestrian community without this, and four focus groups were formed<sup>616</sup>. The commission itself included a number of stakeholders and strenuous efforts were obviously made to engage the whole equestrian community<sup>617</sup>. The FEI website states, ‘[t]he Commission brought together representatives of every area of veterinary medicine, in addition to representatives of all the stakeholder sectors in horse sport and its governing bodies’<sup>618</sup>. The authors of this statement clearly felt that the sports governed by the FEI, especially the Olympic disciplines, represented the entirety of ‘horse sport’ and thought

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<sup>613</sup> *Ibid.* 70.

<sup>614</sup> White, C. (2009) ‘Clearer FEI doping and medication rules for horses welcomed’, <http://www.horseandhound.co.uk/news/clearer-fei-doping-and-medication-rules-for-horses-welcomed-283962> (accessed on 13/07/15.)

<sup>615</sup> Wendt (n 129) 72.

<sup>616</sup> These were the, ‘Laboratory Working Group’ - examining issues related to analysis of FEI samples in relation to policy, the ‘Legal Working Group’ - Anti-Doping and Medication Control Rules, potential amendments and consequent issues, the ‘List Working Group’ - categorisation of substances and TUE matters and the ‘Communications & Education Working Group’ - a communications and education strategy as a key component of the ‘Clean Sport Campaign’, see also <http://www.feicleansport.org/history.html> (accessed on 14/07/15).

<sup>617</sup> According to the Clean Sport section of the FEI’s website, in addition to Professor Ljungqvist there was an owner representative, the CEO of the FEI, a member of the IOC Medical Commission, a team veterinarian, the chair of the FEI Tribunal, a member of CAS, the chair of the Jumping Committee, the chair of the veterinary committee, riders in the jumping, eventing and dressage disciplines, the President of the Norwegian National Federation and the FEI’s Directors of Education & Standards and Communications respectively. See also <http://www.feicleansport.org/history.html> (accessed on 14/07/15).

<sup>618</sup> FEI Clean Sport Website: <http://www.feicleansport.org/history.html> (accessed on 14/07/15).

nothing of the exclusion of non-FEI disciplines, particularly horse racing. It has already been proven that the world of horse sport is not so neatly compartmentalised, and horses competing in FEI sports may well be stablemates with those competing in racing and other non-FEI sports, again the *interface problem*. The same owners and support personnel may well be in contact with both sets of animals. Further, it is clear that these were mostly highly influential people embedded in the sports' ruling elite. It would be surprising indeed if any of the riders co-opted would object to the reprocessing of strict liability, such is the stigma attached to questioning the under-pinning philosophy. Wendt seemed content that little regard was had to the need for sports competitors or other stakeholders at the lower levels to be on the committees and in sufficient numbers to have a loud enough voice. The 'rulers' came together, but no seismic shifts could be expected in such circumstances.

### 6.7.3 The Stevens Commission

The remit of the *Stevens Commission*, originally the Ethics Panel, quickly broadened 'to include a wider overview of equestrian sport to dovetail with the work of the *Ljungqvist Commission*...' <sup>619</sup> Lord Stevens was assisted by the president of the United States Equestrian Federation, the chair of the FEI Tribunal, and the FEI director of jumping. The recommendations of the *Stevens Commission* were merged with those of the *Ljungqvist Commission* to form the 'Joint Commission Recommendations' adopted enthusiastically by the FEI in November 2009 at the FEI General Assembly <sup>620</sup>. Within the sector, applause for the changes that the FEI made to its systems, structures, policies, procedures, and rules has been all but universal. This is something which should not be surprising given the resilient nature of hegemony. Given the structural problems identified in horse sport governance across the board, the regulation of the horse in sport is dysfunctional, given the lack of cohesion between the different ISFs and SGBs. The strides the FEI have made are of great magnitude, albeit beating a familiar path. In the context of the entirety of the more than eighty sports involving horses, the review and the outcomes are woefully parochial. Furthermore, the chance to treat horse sport as something fundamentally different to human only sport was missed.

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<sup>619</sup> *Ibid.*

<sup>620</sup> *Ibid.*

#### 6.7.4 The Irish question and Germany responds

Although other countries were involved, the Olympic equestrian teams of Ireland and Germany were the most affected by the scandals emanating from the Athens and Beijing Games. For Wendt, the fact that Irish riders faced disqualification at two consecutive games was too much for Horse Sport Ireland (HSI). On 21<sup>st</sup> August 2008, four horses tested positive for traces of a derivative of chilli peppers, capsaicin, which as a liniment is found in '*Equi-Block*', often used to soothe sore muscles in a horse. Because of a side effect, the substance had only recently been added to the prohibited substances the FEI tested for<sup>621</sup>. One of those horses was ridden by Irish international, Denis Lynch, who was quite open about the fact that he had used the preparation for about a year before learning that it was prohibited. Brazilian Bernardo Alves found himself in the same situation and was similarly penalised by the FEI tribunal. It would not be a good use of the time of a top international rider to be personally applying ointment to a horse's back after practice or competition any more than Lewis Hamilton is likely to be changing his own tyres. The liniment in question therefore would have been applied by one of the many professional grooms. The way the Irish sporting establishment responded to the scandals of 2004 and 2008 is the point for this section. This reaction emphasises how a paradigm shift is necessary in thinking before the integrity rules and structures in horse sport can be said to be fit for purpose. This is the response of Pat Hickey, the then president of the Olympic Council of Ireland:

‘I am sick and tired of our name being dragged through the mud like this...Yesterday, my IOC colleagues were continually making reference to what they called ‘another scandal for Ireland...’<sup>622</sup>.

Wendt suggests Hickey went as far as to intimate that these scandals might put equestrian sport as a whole in jeopardy as a component of future games<sup>623</sup>. Hickey had no qualms equating the actions of the Irish equestrian team with cheating. There is a desire of sports’ ‘rulers’ to remain part of the dominant class. Given that and the influential role media outlets have, this heated outburst was designed to be palatable both to the press and the equestrian and Olympic

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<sup>621</sup> Wendt (n 129) 71.

<sup>622</sup> Reuters News Agency available at: <http://www.reuters.com/article/2008/08/23/us-olympics-equestrian-ireland-idUSPEK30997520080823> (accessed on 16/07/15).

<sup>623</sup> Wendt (n 129) 71.

establishment. At no time was there even a hint of acknowledgement that the system might itself be fundamentally flawed. To pare the actions of Denis Lynch and/or his support personnel back to the bare essentials, they applied a substance – a plant extract – to an animal to soothe any muscular aches and cramps it might have from intensive exercise. They were not aware or, alternatively, not sufficiently mindful of the (contested) veterinary opinion regarding capsaicin and its prohibition. That is, it is asserted the substance can make skin extra sensitive causing a horse to jump higher to avoid an uncomfortable blow from a fence pole. Because of the concept of strict liability/presumed fault, at no time would it have been necessary to prove who had applied the substance. Neither would the motive, nor what knowledge as to the side effects might have been held, be relevant. In spite of this, IOC members and consequently the press, referred to ‘another scandal for Ireland’. Hickey goes on to state his opinion that standards are lax in equestrian sport.

The foregoing points are particularly striking when it is considered that there were four national teams involved in the controversy over the use of ‘*Equi-Block*’ – Brazil, Norway, Germany, and Ireland –and all had riders banned and sanctions imposed. The German national federation, in a staggering display of pure sycophancy, appealed the decision on sanction in relation to their rider Christian Ahlmann to CAS as ‘unduly lenient’. Such are the lengths that the dominant class in sport will go to be ‘on message’ and not to challenge the accepted ideology. CAS acceded to the request, but in doing so, even they had regard to the argument that there were conflicting opinions about capsaicin and commented that the FEI should look at its regulations again<sup>624</sup>. Ultimately then Lynch was branded a cheat by his own sport’s establishment but even CAS took the view that the performance enhancing properties of the substance were not settled.

There have been cases where over the counter medicines have caused a human athlete to receive sanctions, such as Nurofen<sup>625</sup> and Vicks inhaler<sup>626</sup>. Cases such as these have attracted considerable academic criticism<sup>627</sup>. This is because it was not contested that the athlete had no intent to enhance their performance, nor was there any public policy issue such as there might be

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<sup>624</sup> CAS 2008/A/1700 Deutsche Reiterliche Vereinigung v FEI & Christian Ahlmann

<sup>625</sup> *Răducan v IOC*, Ad Hoc decision 2000/011.

<sup>626</sup> *Baxter v IOC*, CAS 2002/A/376, award of 15/10/2002.

<sup>627</sup> See for example, Amos (n 11) 1-25 and generally Richard MacLaren, ‘Exceptional Circumstances: Is it Strict?’ (2005) 2 (May), *International Sports Law Review*.

with recreational drugs. The *Baxter* case involving the Vicks product is perhaps the most unpleasant, in that it patently involved no unethical behaviour at all. Baxter had a Therapeutic Use Exemption (TUE) in relation to the inhaler as formulated for the UK market. He did not realise that Vicks in the US, where he was competing, used different ingredients. For Amos, this kind of decision causes ‘repugnancy’<sup>628</sup>. This is primarily because the language of anti-doping is inextricably linked with cheating and continually implies intent, quoting Juan Antonio Samaranch’s ‘Doping equals death’ speech<sup>629</sup>.

The 2008 Games cases are cause for further ‘repugnancy’ because they are the equivalent of a case like *Baxter*. Further though, the athletes were from four different countries similarly caught by this contested evidence. The language of the Irish Olympic Council just does not match the actions of Lynch and his team who were not careful, but were not proven cheats. In the same way, Amos identifies a mismatch between the mantras recited by such as Juan Antonio Samaranch and the undisputed vindication *on a moral level* of such as Răducan and Baxter.

HSI responded in turn to the ‘scandal’ however in predictable fashion. Wendt lists a panoply of measures put in place. Dr. Gordon Holmes, chairman of the Parole Board and the *Garda* (Irish Police) Complaints Board, chaired a commission which ‘recommended the establishment of a National Medication and Anti-Doping Testing Programme’<sup>630</sup>. Further, a licensing system was introduced that was linked to attendance on educational programmes, and every Irish rider competing at international level must attend a specified FEI course on doping and medication. Logs of all medications must be kept by riders, veterinarians, and grooms and must be provided to HSI 60 days before the intended competition. Holmes recommended that HSI inspectors be allowed to enter any horse yards to investigate any allegations of wrongdoing<sup>631</sup>. These are all examples of the criminologist’s ‘net widening’ and ‘net thinning’<sup>632</sup> and is where modern criminal justice policy and the state responds to populist demands for a ‘tougher’ response to perceived increases in crime and disorder. This is often egged on by the press with its own

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<sup>628</sup> Amos (n 11) 18.

<sup>629</sup> *Ibid.*, 1.

<sup>630</sup> Wendt (n 129) 71.

<sup>631</sup> *Ibid.*, 71-72.

<sup>632</sup> Newburn (n 60) 763 and 791.



agenda of increasing readership<sup>633</sup>. Ultimately, it serves only to bring more behaviours within the remit of the criminal justice system and reinforces state power over the citizen. So it is here with an SGB and ISF *vis a vis* the competitor.

If the definition of success is that there has not been a repeat of the ‘scandal’ that Hickey referred to, then these measures have been a resounding one. However, this assumes that the anti-doping procedures are 100 percent effective, and they are not. Just as in human sport, there is an argument that only the ‘dopey dopers’<sup>634</sup> get caught. What is similarly immeasurable is the extent to which the new regime causes fear and anxiety among competitors, veterinarians, and owners. This leads to impaired performance, horses unnecessarily withdrawn from competition, and talented people put off coming into the elite level of the sport at all because of bureaucracy and attendant expense. This in a sport which already has a public perception of being elitist and expensive to participate in.

The German response to what had befallen their team at the 2008 games has been described as an ‘explosion’<sup>635</sup>. The German Equestrian Federation, the *Deutsche Reiterliche Vereinigung*, disbanded its entire national team. The *Stevens Commission* was of course originally set up to look specifically at the German team’s behaviour at the Beijing Games, and there were other allegations here beyond being caught up in the capsaicin/*Equi-Block* cases already discussed. In addition, prominent members of the team, such as Germany’s top show jumper, Ludger Beerbaum, did admit to ‘dubious practices’<sup>636</sup>. None of these practices resulted in a tribunal case, so it is impossible to judge how reprehensible they really were. Additionally, the remarks were made in the context of an atmosphere of obsequious contrition further evidenced by the treatment of Christian Ahlmann. It is therefore safe to argue that the FEI’s review, and the individual courses of action by the German and Irish federations, were an overreaction to a symptom of the problem, not the problem itself. The real problem was unquestioning reliance on strict liability and traditional – and sometimes inconsistent – formulations of reverse burdens of proof and

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<sup>633</sup> See Cohen, S. (1980) *Folk Devils and Moral Panics*, London: Martin Robinson and Anderson (n 102) 145 for a discussion in a sporting context.

<sup>634</sup> Anderson (n 137) 141.

<sup>635</sup> Wendt (n 129) 73.

<sup>636</sup> *Ibid.*

standards of proof. The fact is, this is in the one group of sports to which all this is least suited and where, in consequence, it produces the greatest inequity.

The response of the Irish equestrian ‘ruling class’ seems to typify that of the wider sporting community when there are serious integrity issues at the fore. Indeed, there is a tendency to opt for tighter and wider regulation when crime and disorder ‘moral panics’ appear, and Anderson sees doping as an example of one of these ‘folk devils’ in the world of sport<sup>637</sup>. The creation of more than 3,000 new criminal offences by New Labour after 1997 in its ‘net widening’ and ‘net thinning’ effort has been much critiqued. The motive might be to create greater social cohesion and less crime and disorder, but the result is greater social control for its own sake and an absence of justice.

This research has proved that professional sports are a microcosm of wider society and so, as in society, it is far better to look at the root cause of deviant behaviour than simply regulate to counter it. This is especially true as the root cause can be the tighter regulation itself. Research in the field of ‘edgework’ seems to indicate that over-regulation and a consequent perceived lack of freedom can generate deviant behaviour. Examples include the ‘joy riding’ epidemic of the 1990s in the UK’s ‘sink’ estates in particular<sup>638</sup>. Applying these ideas to sports involving horses, what is required is a review of the *way* that doping is regulated rather than *how tightly* it is controlled by way of a new settlement

#### **6.7.5 The issues in endurance**

This research has already mentioned the *interface problem* which is a clear and present danger to integrity regulation in the equine sport sector. In summary, Sheikh Mohammed bin Rashid Al Maktoum, ruler of Dubai, competes under the FEI, owns strings of endurance horses, and also owns the Godolphin flat racing operation which was involved in a doping scandal<sup>639</sup> as well as the Moorley Farm East stables which had drugs seized from it<sup>640</sup>. The yard is run by European endurance champion Jaume Puntigam. The UKBA also seized drugs on a Dubai Royal Air

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<sup>637</sup> Anderson (n 137) 144.

<sup>638</sup> See generally Lyng, S. (Ed.) (2005) *Edgework: The Sociology of Risk Taking*, London: Routledge.

<sup>639</sup> Blitz (n 29).

<sup>640</sup> Watkins (n 30).

Wing flight at Stansted Airport, and Sheikh Mohammed's junior wife Princess Haya was asked by him to head up an investigation into the situation<sup>641</sup>. All this was at a time when the equestrian press was already talking about an integrity 'crisis in endurance'<sup>642</sup> although the Sheikh has never been personally implicated.

It seemed questionable at the time that the Sheikh's wife could be expected to carry out an independent review of her husband's business. This was especially as the review would have to straddle the very different worlds of flat racing and endurance racing. The latter, of course, was governed by the ISF of which Princess Haya was the then president. Sensibly, the princess called in Lord Stevens and his 'Quest' organisation with their experience as the ethics panel investigating the German Olympic team. This did not however occur until the potential conflict of interest was forcefully highlighted by the Swiss national equestrian federation<sup>643</sup>. The bulk of the investigation was in relation to horses used for flat racing, therefore Lord Stevens' semi-public report of 2014 will be discussed *infra*. The Swiss challenge was in fact part of ongoing strife that the princess faced as FEI president<sup>644</sup>.

#### **6.7.6 Adequacy and independence of the reviews**

The research question is *Can changes based on a Gramscian critique of the governance of equine sports substantially reduce the occurrence of crises in integrity for human participants?* The fragmented nature of equine sports governance and reliance on presumed fault make crises in the sports more, not less, likely. This is because, as Howman put it, predominantly 'dopey dopers'<sup>645</sup> are being caught under WADA Code-based regimes which does not bolster faith that the behaviour of serial cheats is being addressed. This same point can also be made about the BHA, coupled with that there is no real reciprocity across the whole equine sport sector in the fight to maintain integrity. There is a proven link between the inequitable power dynamics in wider capitalist society as identified by Gramsci and those to be found in equine SGBs and ISFs. The next question is why repeated reviews of integrity in these organisations have not produced

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<sup>641</sup> Riach (n 28).

<sup>642</sup> Watkins (n 33).

<sup>643</sup> Joe Wilson and Frank Keogh, 'Sheikh Mohammed: Swiss Federation questions inquiry', (BBC Sport Online 3 October 2013) available at: <http://www.bbc.co.uk/sport/0/horse-racing/24379893> (accessed on 21/07/15).

<sup>644</sup> Wendt (n 129) 74.

<sup>645</sup> Anderson (n 137) 141.

a sea-change in integrity management. To do so they would have to be adequate and display independence in fact and also in thought.

The *Ljungqvist* and *Stevens* Commissions were independent of the FEI in the technical sense, they were external bodies with sports and/or investigative expertise. The problems with governance and presumed fault, however, will not be solved by simply amending regulations, tightening procedures, nor even by widening access to databases of substances by technology. These efforts have had laudable aims, but the reviews have not been independent of the hegemony of sports governance. The *Ljungqvist Commission* was headed by a professor and former sports personality who had no experience of equestrianism. The team contained key players in the way that sports doping is currently confronted. The *Stevens Commission* was headed by a former head of Scotland Yard who, as a key part of the prosecution arm of the state, would be unlikely to have any problem with the concept of strict liability. His panel was also drawn from the equestrian ‘ruling class’. Gramsci returned time and again to the ‘coercive power of the [ruling class] state apparatus...’<sup>646</sup>. The review members, both subconsciously and consciously, because of their status in sport and society, will be key players in bringing about Gramsci’s ‘...acceptance by the ruled of a conception of the world which belongs to the rulers’<sup>647</sup>. Sports participants and functionaries do not question the received truths presented to them. This is exemplified by the reactions of the Irish and German federations to the doping findings at the Beijing Games. At no point did any review address the basic flaw of applying the WADA Code, with few substantive revisions, to non-human athletes.

There is a further point, in that the reviews were necessarily limited by the current compartmentalisation of governance within the realm of sports involving horses. There are more than eighty sports involving horses worldwide, and the reviews had within their remit only the sports that the FEI governs. Horse racing derives no direct benefit from those reviews, neither do a host of disciplines competing throughout the world as non-FEI governed sport.

Turning now to whether the responses were adequate, in one sense they were: The ‘Clean Sport Commission’ response was swift, and far reaching. Ingmar De Vos, the new president stated,

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<sup>646</sup> Berberoğlu (n 323) 57.

<sup>647</sup> *Ibid.*

‘[The FEI] is a much better organisation...than it was four years ago’<sup>648</sup>. On another level, however the FEI itself has not been capable of the Kuhnian ‘paradigm shift’<sup>649</sup>. This could have led to it distancing itself from the presumed fault/strict liability principle. Given the above, the obeisance of the Irish and German national federations could also be described as adequate, if not more than adequate. Both went beyond what was mandated in taking extraordinary measures to show they accepted the judgment of the ‘equestrian ruling class’ and were contrite. Again though, no effort at all was made by either nation to challenge the fundamental pillars that underpin the current equestrian anti-doping regime.

## **6.8 Setting horseracing’s house in order**

We have established that it has been difficult to discuss the governance, disciplinary procedures, nor indeed the various reviews of horse racing in the UK in the same breath as the same discussion on equestrianism. This is because of the wholly different way that the two sporting sectors are governed. Any reviews into British horse racing must be limited to the UK because the BHA has no jurisdiction overseas. There is no ISF, only a federation which makes limited attempts to harmonise the procedures of the different national racing bodies. In contrast, while the FEI has been considered by some to be Eurocentric<sup>650</sup> it is an ISF and has global influence. Nevertheless, the BHA and its forerunner the Jockey Club/British Horseracing Board<sup>651</sup> has an august history dating from 1752<sup>652</sup>. This also predates any other attempt to regulate flat and jump racing at national level anywhere. In addition, as established, there are significant potential areas of interface in practice between racing and some of the sports that the FEI governs. High profile scandals have engulfed both endurance racing (FEI) and flat racing (BHA) and some of the review effort discussed below straddled both sectors, or should have. With the foregoing in mind the various reviews carried out this century into UK horse racing and integrity will be considered next.

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<sup>648</sup> Wendt (n 129) 74.

<sup>649</sup> See Thomas Kuhn, ‘The Structure of Scientific Revolutions’, *The International Encyclopedia of Unified Science*, Vol. 2, No. 2, (Chicago: University of Chicago Press 1970).

<sup>650</sup> Wendt (n 129) 74.

<sup>651</sup> Vamplew (n 130) 104.

<sup>652</sup> *Ibid.* 94-95.

### 6.8.1 The Jockey Club's '2003 Joint Security Review'.

The drivers for the 2003 review was media intrusion. In 2002, Panorama's *The Corruption of Racing* and an episode of *Kenyon Confronts* were aired. Together they exposed examples of corruption within racing, but also how ineffectual the Jockey Club and BHB had been in trying to combat the threat<sup>653</sup>. The Jockey Club publicly only admitted that the programmes speeded up a process already under way. The Executive Summary of the Review Report also cites the arrests of five well known jockeys and a trainer in 1998 and 1999 (notwithstanding their subsequent exculpation) and the Crown Court trial in 2000 of five persons accused of conspiring to defraud. This was over a doping allegation and led to severe internal disciplinary measures against three of those persons. The summary also notes a series of criminal trials involving international drug smuggling coming to a conclusion in 2002 wherein allegations came to light about the corrupt activities of criminals in horseracing<sup>654</sup>.

According to the current BHA archive, the Review<sup>655</sup> Group consisted of senior figures from both the Jockey Club and the BHB. In addition, the Horserace Betting Levy Board and the Department for Culture, Media and Sport were represented and a retired senior police detective was also co-opted. Most interestingly 'the Group was independently chaired by a retired Chief Constable'<sup>656</sup>. It is apparent therefore that, as with the FEI, the forerunners of the BHA considered 'independence' in its narrowest sense, and it is this parochial approach that should raise concerns. Similar to the FEI reviews, the group members were all stakeholders in their own industry, civil servants, or retired police. Definitions of the phrase 'blue-sky thinking' vary but it can mean 'creative ideas that are not limited by current thinking or beliefs'<sup>657</sup>. It is this that is needed with respect to the regulation of sports involving equines, in particular anti-doping policies and not likely to come from people with life experiences such as this. Many of the 2003

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<sup>653</sup> *Ibid.* 106.

<sup>654</sup> BHA Press Releases available at: [http://www.britishhorseracing.com/press\\_releases/joint-bhbjc-security-review-group-report/](http://www.britishhorseracing.com/press_releases/joint-bhbjc-security-review-group-report/) (accessed on 24/07/15).

<sup>655</sup> The terms of reference of the review can be summarised as 'to identify the nature of the threats to the integrity of horseracing in Great Britain and assess the breadth and depth of such threats; and to consider how best the Security Department of the Jockey Club should be structured and organised to deal with the threats to racing's integrity. See also BHA Press Releases available at: [http://www.britishhorseracing.com/press\\_releases/joint-bhbjc-security-review-group-report/](http://www.britishhorseracing.com/press_releases/joint-bhbjc-security-review-group-report/) (accessed on 24/07/15).

<sup>656</sup> *Ibid.*

<sup>657</sup> Collins English Dictionary.

Joint Security Review Recommendations, made after only five months' investigation, concern integrity issues to do with betting and lay-betting. These are not currently a pertinent issue to the FEI, but might become more so considering arguments on betting-based irregularity to be explored later.

The Review Group identified threats to integrity under five headings at its inception in January of 2003<sup>658</sup>. The group differentiated between fact and public perception in its efforts to examine the threat to integrity. In other words, the group considered whether racing was 'institutionally corrupt, or alternatively, that it could be found guilty of at least a corporate failure by the regulators of the sport and betting industries to act on suspicions that corrupt practices were taking place<sup>659</sup>. The group found these allegations unsubstantiated, but nevertheless made no fewer than thirty-six recommendations. Many of the recommendations were aimed at tightening security at the race track and restructuring racing's professional security operation, but in this section, the main consideration remains the independence of the review. Issue has to be taken with the way that the BHA, its forerunners, and the FEI have set up boards of enquiry. It seems inevitable that they would be incapable of thinking independently from the norms and values they already hold. The results of the reviews considered so far can be summarised as 'more of the same' and 'tunnel vision'. With the 2003 review, the staff are either racing's 'apparatchiks' or police. Consequently, recommendations such as the following are unsurprising and are evidence of the lack of independence of thought:

#### 'Recommendation 2

The Jockey Club Security Department's primary responsibility should be to

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<sup>658</sup> Breaches of the Orders and Rules of Racing by persons licensed or registered by the Jockey Club..., corrupt practice by any person in respect of gambling on horses..., criminal activity including terrorism and animal rights extremism, the doping of horses, money laundering and other corrupt practices concerned with horseracing, illegal activity which affects the welfare of racehorses; and breaches of employment laws in respect of staff... See also, BHA Press Releases available at: [http://www.britishhorseracing.com/press\\_releases/joint-bhbjc-security-review-group-report/](http://www.britishhorseracing.com/press_releases/joint-bhbjc-security-review-group-report/) (accessed on 27/07/15).

<sup>659</sup> *Ibid.*

police ‘The Orders and Rules of Racing’; criminal offences are matters for the Police’<sup>660</sup>.

This does not in fact even accord with the trajectory of modern policing. Swathes of criminal activity – particularly that carried out in the private sphere – is ‘policed’ by the relevant professional body. The FCA regulates lenders and the SRA solicitors and so on. This ‘self-policing’ is not without its critics<sup>661</sup> as it can lead to conflicts of interest<sup>662</sup>. Despite this, one of the major problems with traditional law enforcement being expected to police ‘white collar’ crime is that it frequently happens in the private sphere. Further, the offender is often legitimately present, neither of which is always true with traditional notions of ‘working class’ crime. There will always be a threshold above which criminal prosecution must take place, as is the position with professional regulation. With the professions, there is nevertheless a movement towards self-policing, administrative penalties, and stringent criminal penalties only as a last resort. This does mean that some actions which might be constructed as fraud or negligence are instead viewed as poor accounting practice or professional incompetence<sup>663</sup>. Nevertheless, the desired outcome, a reduction in the undesired activity, can be achieved by these called ‘administrative measures’<sup>664</sup> as they can mean loss of livelihood. This view is borne out by reference to Para 8.18 of the Executive Summary of the later Neville Report:

‘...the criminal justice system is an inefficient and inadequate means by which to seek to regulate horseracing, [and] that the regulation of malpractice in horseracing can be better performed by the BHA’<sup>665</sup>.

Returning to the Joint Security Review, more evidence of the lack of ‘blue sky thinking’ can be found in consideration of extending the flawed concept of strict liability:

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<sup>660</sup> *Ibid.*

<sup>661</sup> Mike Maguire et al. (Eds) *Oxford Handbook of Criminology*, 4<sup>th</sup> Edn (Oxford: OUP 2007) 753.

<sup>662</sup> *Ibid.*

<sup>663</sup> *Ibid.* 758.

<sup>664</sup> *Ibid.* 753.

<sup>665</sup> BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 29/07/15).



## ‘Recommendation 35

The Jockey Club Regulatory Board to review the position of the trainer when the jockey is found in breach of the Rules in relation to non-triers; that should include consideration of a “strict liability” offence, and more severe penalties, including suspension in serious cases<sup>666</sup>.

This is to counter deliberate attempts by a jockey to lose a race, usually in league with bettors



**Figure 9 – Jockeys are more limited now in their use of the whip**

placing a ‘lay bet’. With legalisation of lay betting<sup>667</sup> and the growth of betting exchanges such as Betfair, betting on horses to lose has become much more common. It is not possible to guarantee that a horse wins a race, but it is possible to ensure it stands every chance of losing. The problem for the stewards at the

racecourse, and for the disciplinary tribunal, is determining whether a

horse lost because it was outmatched by its competitors on the day, or whether the jockey did anything to slow down its progress. Alternatively, was it the case that the jockey failed to do all that he or she could within the rules to encourage the horse? Horses are urged to go faster by a variety of commands or ‘aids’, including the jockey’s position and rhythmic moving of his or her body, the whip is in fact little used by comparison. ‘Race Readers’ are employed by the BHA

<sup>666</sup> BHA Press Releases available at: [http://www.britishhorseracing.com/press\\_releases/joint-bhbjc-security-review-group-report/](http://www.britishhorseracing.com/press_releases/joint-bhbjc-security-review-group-report/) (accessed on 27/07/15).

<sup>667</sup> Most recently enshrined in statute S9(1) Gambling Act 2005

who use their skills and experience to determine if, in their opinion, a horse was deliberately ridden tactically such that it could not win.

Pared back to the basic principle, what is proposed in Regulation 35 is the imposition of strict liability on a human trainer when the non-human/human athlete team does not perform. Strict liability is unsuitable and inequitable for sports involving horses, up to now, that has been mainly in respect of doping cases. *Inter alia* those arguments concern the lack of autonomy of the horse-athlete versus the traditional notion that an athlete is responsible for what goes into their body. This is nonsensical when applied to the unique pairing of human and non-human athlete because of the far greater number of complex variables at play. With regard to ‘non-triers’, strict liability fixed on a trainer in this context is similarly unjust in that some of those variables to do with a human/non-human athlete team and support entourage are still there. There is, in fact, an additional factor peculiar to racing. Just like in a doping case, a jockey may have deliberately flouted the rules to gain financial advantage. Similarly, there may be other reasons why a jockey appears not to have ‘tried’ to win. There has been for some time controversy over flat and particularly jump racing<sup>668</sup> framed in terms of animal welfare and the use of the whip. This was the case even before new rules on the use of the whip were introduced in 2011. Consequently, a jockey has to be mindful of the extent to which he or she pushes a horse toward its limit, whether that is in terms of fear of stress injury or a fall or over-use of the whip. This argument is particularly pertinent since it was mooted that ‘draconian’<sup>669</sup> rules would be introduced to limit use of the whip. It was proposed that a jockey would now only use a maximum of seven strokes in flat races and eight in jump racing. The whip may only be used up to five times after the last obstacle or in the final furlong. Even one stroke too many can result in loss of prize money or a ban. The introduction of these measures lead to crisis talks to avoid a strike by jockeys after large prize pots were forfeited for a single stroke over those limits<sup>670</sup>. This, in itself, would have been an imposition of strict liability with significant disproportionality evident as well. It is hard not to

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<sup>668</sup> Stephen Moss, ‘The Grand National: sport or barbarity? Horse racing's big day on trial’ (London: The Guardian Online 5 April 2013) available at <http://www.theguardian.com/sport/2013/apr/05/grand-national-sport-or-barbarity> (accessed on 04/06/15).

<sup>669</sup> Cornelius Lysaght, BBC horse racing correspondent, in providing analysis in support of Frank Keogh, ‘Jockeys to meet horse racing bosses over whip dispute’, (BBC Sport Online 16 October 2011) available at <http://www.bbc.co.uk/sport/0/horse-racing/15327053> (accessed on 22/10/15)

<sup>670</sup> Keogh, (n 669).

sympathise with jockeys and trainers feeling that they are placed in a very difficult position by these proposed rules and ultimately a compromise was reached involving an element of discretion by stewards.

Whether or not the rule is ever fully implemented, the argument pertinent to the adequacy of the reviews remains. The fact that it was a recommendation alone is further evidence of a lack of independence of thought by a major review board into sports involving equines. True independence would only come from a board consisting mainly or entirely of sector outsiders, whether considering FEI-governed sports, horse racing, or any other equine-based sport. Otherwise the inevitable result will be growing regulation and reliance on traditional, yet inappropriate and clumsy, legal principles because that suits the needs of the enforcers, the ‘rulers’. The result is human athletes and support personnel so mired in detailed regulation – often conflicting and unclear – <sup>671</sup> that it is difficult to see how they can perform to their best ability.

### **6.8.2 The Neville Review into integrity in racing**

The *Neville Review* was chaired by Dame Elizabeth Neville QPM, a former chief constable, and consisted of another senior police officer, Michael Page QPM and Anglo-American multi-national law firm DLA Piper as legal advisers. Initially the review was to:

‘carry out a Post Implementation Review of the Recommendations of the 2003 Security Review with a view to assessing how such measures have protected the integrity of racing, identify areas for development to improve the British Horseracing Authority’s role in protecting the integrity of racing and review relevant Rules of Racing and penalties connected with integrity issues’<sup>672</sup>.

The terms of reference were expanded however to include an assessment of when and how SGBs should proceed with sports disciplinary matters that disclose breaches in the criminal law. This

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<sup>671</sup> *Ibid.*

<sup>672</sup> BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 30/07/15)

was prompted by the collapse of the corruption trial of Rodgers, Fallon, Williams, and Lynch<sup>673</sup> after an investigation by the City of London Police with that force's national remit in respect of financial crime. This was a criminal enquiry where the BHA was allowed virtually no involvement.

In summary, the *Neville Review* congratulated the BHA in its implementation of the findings of the review of 2003, but remained critical of some remaining failings. In particular, situational crime prevention measures on race days such as physical security of stabling and CCTV siting and usage were mentioned as in need of development. There was also adverse comment about the lack of risk assessment within intelligence gathering, which the review felt would reveal wider threats. These were 'related to criminal activity including terrorism, animal rights extremism, and money laundering, use of unidentified techniques or drugs to enhance or depress equine performance, increasing use of information technology to aid betting and suppress activity counter to equine welfare'<sup>674</sup>. The comment on 'unidentified techniques and drugs' is particularly pertinent for this research. One of the key problems with the current rule construction paradigm is that if a substance is prohibited, its presence in the body of an athlete leads to a doping conviction, if it is not on the list it does not. All that is required for a determined cheat is to be more and more pharmaceutically sophisticated such that substances are used that are not yet on the list.

One recurring theme in this research is that more regulation and especially *over* regulation does not necessarily lead to justice, efficiency, or even a general sense of equity. The *Neville Review* accords with this view in that it criticises the Orders and Rules of Racing as being too large and lacking in clarity after years of amendment. These rules contain provisions relating to employment conditions as well as doping, and anti-corruption provisions as well as animal welfare<sup>675</sup>; the breadth is quite staggering. The review recommended streamlining and focusing the document radically, an internal review was already under way to consider re-writing of the

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<sup>673</sup> 'Fallon race-fixing trial collapses' (London: Guardian Online 7 December 2007) available at <http://www.theguardian.com/uk/2007/dec/07/sport.ukcrime> (accessed on 30/07/15).

<sup>674</sup> BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 30/07/15) para. 1.21.

<sup>675</sup> *Ibid.*, para. 1.23.

rules in plainer language and in a more logical format, but the *Neville Review* goes further in quite a startling way. Paragraph 1.24 of the Executive Summary is, in large part, reproduced here because of its unexpected departure from the norms and values prevalent in sports regulation:

‘...ideally, rules should be based on a set of underpinning principles. The rules themselves should not be too detailed in order to allow them to be applied more flexibly. The recommended model would be to have a set of principles supported by codes of conduct with rules which sit under them. A breach of a principle or a code of conduct can lead to a liability to disciplinary sanction, even if there is no specific rule. This gives flexibility and means that it is not necessary to try to cater for every eventuality in the rules’<sup>676</sup>.

This is ultimately presented as Recommendation ‘R5’ of the report. There are two points of note that flow from this short paragraph tucked away in the executive summary of one of many reviews. Firstly, if fully implemented, it would represent the paradigm shift that is necessary to address many of the potential shortcomings of anti-doping and integrity regulations found in *all* equine sports. Immediately though, the fundamental problem of the disparate nature of equine sports governance is an obstacle. Specifically, under current governance arrangements, this review as a whole and this suggested way forward can only apply to horse racing, not only that but horse racing in only one country, the UK. Nevertheless, the theme of this paragraph chimes with some of the ideas to be discussed later around a ‘due diligence’ defence which is augmented by a set of principles resembling those found in the current UK Bribery Act 2010. However, this short paragraph provides a vehicle to go much further. Dame Neville’s proposal could provide a basis for a new set of Rules of Racing rewritten from first principles. Any such new rules could be divided in structure like the FEI regulations are, there could be human anti-doping regulations which could essentially be a derivation of the WADA Code<sup>677</sup>, a separate document dealing with equine anti-doping and controlled medication, and a third document dealing with anti-corruption measures. As the *Neville Review* suggests, anything else could be in a separate document again

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<sup>676</sup> *Ibid.* para. 1.24.

<sup>677</sup> The limitations of the strict liability rule and other evidential rules as applied to human athletes is referred to in this thesis repeatedly, but is largely outside the scope of this study. Therefore although there may be scope to apply the ‘principles’ approach to human riders, that is left to later research.

which deals with conditions of licence and registration<sup>678</sup> and not really to do with sporting integrity at all. The anti-doping document and the anti-corruption measures have the potential to recognise the unique nature of human/equine athlete teams. They can do this by being based on principles which underpin rules that either mitigate strict liability or side-step the strict/fault-based liability concept altogether if drafted in the way that Dame Neville seems to suggest.

What is particularly exciting is that should some sort of parity in governance arrangements between different equine-based sports be achieved in the longer term, then new codes drafted as described above could be applied to other equine sports including, but not limited to, FEI-governed sports. It is likely that any 'integrity code' would be of greatest interest to other equine sports where there is a betting culture, harness racing for example, but should betting on other sports, such as eventing, expand in the future as discussed *infra*, then the FEI would be ahead of the game in being ready for that development.

The second point of note from Dame Neville's Recommendation R5 is the departure from literal modes of interpretation that is implicit therein. There is currently a mixture of common law and civil law concepts in sports regulation – 'comfortable satisfaction' – which is much more familiar to civil code lawyers sits with a form of the concept of *Stare Decisis* which is in the common-law tradition. Despite this, there is an overwhelming reliance on what would be called literal interpretation in any study of common law statutory interpretation<sup>679</sup>. Dame Neville's suggestion relies far more heavily on the purposive approach, alien to English common law for centuries, but gaining acceptance largely to the accession of the UK to the European Union in 1973<sup>680</sup>. This is because, with the exception of the Republic of Ireland, all of the other EU member states, and certainly all of the founding members, operate under a civil code and have a Romano-Germanic legal tradition<sup>681</sup>. Consequent on this, much European law bears greatest resemblance to that found in civil code jurisdictions rather than common law ones, as most of the frameworks for EU law making were laid in place prior to 1973. The WADA Code and the

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<sup>678</sup> BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf>, para. 1.25 (accessed on 30/07/15).

<sup>679</sup> See for example Richard Ward and Amanda Akhtar, *Walker and Walker's English Legal System*, 10<sup>th</sup> edn, (Oxford OUP 2008) 48, Slapper and Kelly (n 13) 167-170.

<sup>680</sup> See for example *R v Bentham* [2005] UKHL 18.

<sup>681</sup> Dennis Keenan, *Smith and Keenan's English Law*, 14<sup>th</sup> Edn., (Harlow: Pearson 2004) 203.

EADCMRs derived from it however require a literal rather than a purposive interpretation. In addition, by way of example, considering the arguments put forward in the *Sharbatly* and *Al Eid* cases, literal interpretation reasoning is clearly applied in CAS tribunals and those that model themselves on CAS. Counsel for both riders in that case advanced arguments which were, in fact, equivalent to mitigation in sentencing, the only route available given the strict liability principle. These arguments centred on the degree of negligence displayed by each rider, as fault is an element in relation to sanction. The degree to which unintentional contamination could have happened via a third party's lack of stable management protocol was also considered, all in relation to the exact wording of the then Article 10.4.1 of the EADCMRs.

A move to a more purposive style could prevent some of the decisions, the like of which Amos refers to with 'repugnance'<sup>682</sup> from being repeated with regard to equine cases. The Queen's horse *Estimate*<sup>683</sup> was just one example; contaminated feed at the manufacturer led to an adverse analytical finding and, under the Rules of Racing, forfeiture of result and prize money. *R (Mullins) v Appeal Board of the Jockey Club [2005] EWHC 2197* concerned contaminated feed at the manufacturer and no one blamed the yard for that, nevertheless huge sums were expended trying to avert a moral as well as a financial injustice. *Vanhoeve* and *Lobster 43*, horses whose fates have already been critiqued earlier are but two other examples from the other side of the arbitrary governance divide – in equestrianism. The move need not horrify even the most traditional of lawyers trained in the Anglo-American legal tradition, because a close cousin of the purposive approach, the mischief rule, has a long history in the common law. This is an especially pertinent comment given that Article 50 of the TFEU was triggered on 29<sup>th</sup> March 2017 and there is no way of knowing what influence 'Brexit' will have on judges' preference for the use of the 'purposive approach' with its clear EU roots post-2019. The requirements for this kind of interpretation lend themselves to any new rules based on broad principles rather than the current approach which tries to deal with 'every eventuality'. This is because the emphasis is overwhelmingly on what the law was trying to prevent or encourage. *Heydon's Case*<sup>684</sup> provides

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<sup>682</sup> Amos (n11) 18.

<sup>683</sup> Rayner (n 348).

<sup>684</sup> [1584] EWHC Exch J36

the requirements for the mischief rule and with minor amendments this approach could be used in sporting tribunals:

What was the [old rule, if any] before [the rules were rewritten]?

What was the mischief and defect for which [old rule, if any] did not provide?

What was the [new rule and principle/s] passed to cure the mischief?

What was the true reason for the [new rule and principle's]?

The case of *Smith v Hughes*<sup>685</sup> illustrates how this works in domestic law. Prostitutes were prevented from soliciting in the street by the newly-enacted *Street Offences Act 1959* so they hailed potential clients from windows and balconies which, taking a literal interpretation, cannot be regarded as other than a private place. Nevertheless, soliciting in this way was well within the ‘mischief’ the act was designed to discourage so, applying the mischief rule, the prostitutes were convicted. Such an approach in integrity cases, whether equestrian or horse racing, FEI or other SGB, could drill down to the central question very quickly without getting lost in complex and often contradictory regulatory provisions. The central question is very often ‘*did the athlete, owner or trainer cheat or intend to cheat?*’ This question surprisingly appears to be absent from a number of doping cases conducted under the current rules. In doping cases proved forensically to be from unwitting contamination of non-human athlete feed at source for instance, the finding would be most likely to be that the humans involved did not cheat. One reading of the *Equi-block* cases in 2008 might be that a substance was used for therapeutic purposes without thought as to its potential for cheating, especially given CAS’s stated reservations about the inclusion of capsaicin on the prohibited list. Such a case is likely to be hard fought, but at least a finding that the athlete need not be labelled a cheat is *possible*, unlike under current regulations.

There cannot be a vacuum left if the rider is exonerated under such principles. This is addressed by the fact that ‘...no specific rule...’ need be broken for a disciplinary to take place. If the rider or anyone charged is ‘no guilty’, under ‘Neville’ style rules<sup>686</sup>, then the principles and framework

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<sup>685</sup> [1960] 1 WLR 830

<sup>686</sup> There may well be a disqualification of horse and rider from the current event, but suitable drafting can provide this as an administrative procedure rather than due to a finding of fault.



should be drafted such that others can then be brought to account. Such are the possibilities with this ‘root and branch’ new approach to rule construction.

Paragraph 1.24 does stand out as an example of the ‘blue sky thinking’ so lacking hitherto and it is worthy of note that this review board also stands out as different in profile. There was no predominance of industry insiders and instead two-thirds of the advice came from trained international lawyers as opposed to purely ex-senior police officers.

There has been a further internal review by the BHA commenced in June 2015 and timed to coincide with the arrival of Sir Paul Stephenson, ex-Metropolitan Police Commissioner, to the BHA Board who acted as consultant and project sponsor<sup>687</sup>. The most recent review however resulted from serious public controversy and has already been detailed in this research. The Quinlan Review of 2016 brought about in large part by the *Jim Best* Case where allegations of ‘stopping’ were laid against a well-known race horse trainer<sup>688</sup>. As a direct result of the counter-allegations of bias, and the potential for other cases to be re-opened on the same basis, Christopher Quinlan QC conducted a review for the BHA to ensure ‘that the disciplinary, licensing and appeal functions remain legally robust and would withstand legal challenge’ and ‘that proceedings before such bodies comply with the highest standards of procedural fairness...’<sup>689</sup>. The result was that the findings spurred the BHA to set up an arm’s length disciplinary hierarchy without delay<sup>690</sup> but still applying the Orders and Rules of Racing. Although some review of the contents of those rules was under way concurrently at the BHA, there are no plans to incorporate Dame Neville’s Para 1.24 in that re-write.

### **6.8.3 The ‘Quest’ investigation into Godolphin**

This investigation had a much narrower remit than those discussed above which were set in motion by an SGB or an ISF and had industry-wide ramifications. This enquiry was instigated by Princess Haya, former FEI president at the behest of her husband, Sheikh Mohammed. This

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<sup>687</sup> BHA Press Releases available at: [http://www.britishhorseracing.com/press\\_releases/adam-brickell-confirms-details-of-bhas-integrity-review](http://www.britishhorseracing.com/press_releases/adam-brickell-confirms-details-of-bhas-integrity-review) (accessed on 02/08/15).

<sup>688</sup> ‘Jim Best may seek High Court ruling over rehearing dispute with BHA’ (n 567).

<sup>689</sup> Quinlan Review, Terms of Reference 2016 (n 568).

<sup>690</sup> BHA Press Release – available at: [http://www.britishhorseracing.com/press\\_releases/bha-changes-to-disciplinary-panels-and-regulatory-functions/](http://www.britishhorseracing.com/press_releases/bha-changes-to-disciplinary-panels-and-regulatory-functions/) (accessed on 21/04/17).

research has already considered the issues that the Sheikh's Godolphin flat racing operation faced in 2013 and the shockwaves that reached as far as the FEI sport of endurance racing. Furthermore, the discovery of banned substances at a Godolphin yard by DEFRA's VMD and a seizure by the UK Border Agency of banned substances incorrectly labelled as 'tack' on board a Royal flight from Dubai arriving at Stansted are pertinent. At the time of the seizure on the Royal flight, Keith Chandler, president of the British Equine Veterinary Association, emphasised the importance of the find to the Guardian newspaper:

'[The seized drugs] definitely should not, under absolutely no circumstances whatsoever, be found on an owner's premises. There are powerful sedatives and anaesthetics on the list, there are powerful painkillers and one of the products is toxic and dangerous to humans as well. They are clearly being used to treat and medicate horses'<sup>691</sup>.

At the same time, a full list of the drugs seized was passed to the BHA which was quick to emphasise that 'DEFRA have confirmed to the BHA that they consider there to be no link between the seizure and the racing industry and that the products were not intended for use on thoroughbreds'<sup>692</sup>. They were equally keen to rush through an internal enquiry establishing that the drugs at the yard were the work of a 'rogue individual' not orchestrated by the Godolphin organisation as a whole<sup>693</sup> although they were highly critical of the way that the yard was run.

Lord Stevens who had carried out the ethics investigation into the German Olympic team and his 'Quest' organisation carried out the investigation for Sheikh Mohammed and there was partial publication in February 2014. Controversially however, the full findings of the report were not disclosed. Despite this, the report was recognised as exonerating Sheikh Mohammed completely while exposing 'management failings, insufficient oversight and complacency' in his organisation<sup>694</sup>.

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<sup>691</sup> Riach (n 28).

<sup>692</sup> *Ibid.*

<sup>693</sup> *Ibid.*

<sup>694</sup> Rumsby, Cuckson and Armytage (n 25).

The report also looked at the Stansted seizures and in the findings there it is possible to determine some very different conclusions to those arrived at by Keith Chandler. The Quest report claims the drugs were improperly imported, but were not ‘illegal...[and]...widely used and considered safe ...[with quantities] not in themselves unusual’<sup>695</sup>. The report in fact went further and asserted that the drugs were available in the UK under other brand names. The report also concluded there was no link with the *Al Zarooni* case. The contrast with the views of the president of the British Equine Veterinary Association’s views at the time of the Stansted seizure, quoted above, is stark and the two are very difficult to reconcile. A Gramscian analysis of this review in particular reveals a familiar theme. The ‘rulers’ in this sporting context are literally rulers in society. In turn, it is noteworthy that they are asking other members of the ruling class to review their activities. Fundamental change is never likely to materialise in such circumstances and in any event the remit of this review was extremely and unusually limited.

#### **6.8.4 Horse racing: ‘A model for the effective investigation of corruption in sport’?**

With these words, the BHA presents itself to the outside world in terms of its attempts to tackle integrity issues and they are found in more than one BHA press release. The quote is from the *Neville Review*<sup>696</sup>, and was apparently how the BHA Integrity Services and Licensing Department (IS&LD) is viewed by a ‘number of agencies’. There is no doubt the BHA is in a better position than its predecessor was in 2002 to tackle corruption, whether doping or betting-related. Crucially, public perception of the organisation’s willingness to get its house in order has changed. In some respects, this perception is far more important than high profile disciplinary proceedings, or even successful prosecutions. In wider society, public perception about wrongdoing is now recognised as at least as important as the actual levels of crime and disorder, if not more so. Governments in developed countries have long given up on trying to persuade the public that street crime is on the way down<sup>697</sup> but have responded instead to public fear of crime,

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<sup>695</sup> *Ibid.*

<sup>696</sup> Neville Review Executive summary, web, para1.12, BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 02/11/15).

<sup>697</sup> For analysis see ‘Crime data: Homicide at 30-year England and Wales low’, BBC Online, available at: <http://www.bbc.co.uk/news/uk-18900384> (accessed on 02/11/15).

often stoked by the editorial needs of, particularly, the print press<sup>698</sup> and engaged large numbers of uniformed ‘auxiliaries’ to provide a visible reassurance<sup>699</sup> presence on the street. This is despite the lack of evidence that a visible uniformed presence deters the actual commission of crime. So it is in the microcosm that is sport governed by an SGB that the received truth is that it is more important than anything that corruption *appears* to be being tackled for people to feel confident about betting on the outcome of a race.

There remains, however, concern at a deeper level that the answer is often seen as greater and more detailed regulation, harsher punishment, and greater resources for detection. In sport involving horses, there exists an opportunity to shape a new hegemony with integrity principles purposively interpreted much as the Solicitors Regulatory Authority (SRA) has done in shaping its new disciplinary rules<sup>700</sup>. Any such paradigm shift though is unlikely to be driven by review boards that are made up of BHA or FEI mandarins and ex-police officers. In spite of this, the Neville Review does stand out as capable of innovative thinking, most likely because of the review team’s unusual composition. The recommendation for simpler, streamlined rules based on core principles is welcome and should be enthusiastically explored. Such a new set of rules, once bedded in, refined, and shown to be working, should persuade other equine-based sport SGBs and ISFs to follow suit.

The investigation into the Godolphin flat racing operation does not however, *prima facie*, have sufficient adequacy and independence. That judgment can only be made on its face because the entire report by Lord Stevens and Quest was not made public so a meaningful, detailed analysis is impossible. The BHA internal investigation regarding the Sheikh Mohammed matters was hastily concluded and resulted ultimately only in sanctions, official and unofficial<sup>701</sup>, against a relatively low-ranking individual, a trainer. The BHA has kept the affair at arm’s length by insisting that thoroughbreds were not involved, or that there is ‘no link between the seizure at

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<sup>698</sup> Maguire (n 661) 690.

<sup>699</sup> See for instance Crawford (n 38), Merritt and Dingwall (n 39), Merritt (n 39).

<sup>700</sup> The SRA’s ‘Ten Principles’ 2016

<http://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page> (accessed on 28/10/16).

<sup>701</sup> ‘Godolphin: Sheikh Mohammed says trainer Al Zarooni ‘finished’’, (BBC Sport Online 13 January 2014), available at <http://www.bbc.co.uk/sport/0/horse-racing/25703901> (accessed on 05/08/15).

either Stansted or Moorley Farm and the racing industry<sup>702</sup>. The distinction that the BHA is implicitly making with horses competing under a different SGB, presumably the FEI, is a tenuous one at best and rests on the current fragmentation of governance of sports involving equines. The BHA would have been better served to have carried out the full enquiry itself. That said, the level of vigour of the initial BHA enquiry compared to that carried out by *Quest* at Sheikh Mohammed's behest was itself the subject of criticism. Neither Sheikh Mohammed himself nor Al Zarooni were ever interviewed by the BHA for instance<sup>703</sup>. The lack of transparency regarding *Quest*'s findings does make it more likely that questions over just how widespread behaviour like Al Zarooni's is will remain. This is bound to reflect on the horse racing industry as a whole, despite the BHA's attempts to distance itself from the whole affair.

## **6.9 Conclusion: A review of the reviews**

The foregoing sections have set out to consider the adequacy of the reviews carried out in equine sport so far this century. This has been done within the methodology selected for the entire thesis in that it has examined the letter of the reviews and considered their socio-legal context through a Gramscian lens. Engaging industry insiders, with impressive curriculum vitae, together with senior police figures is currently considered independent. By that measure, the *Ljungqvist Commission*, the *Stevens Commission*, the *Joint BHB/JC Security Review Group Report* of 2003, the *Neville Review* and the *Quest* report into Godolphin are all independent. This section throws that assumption of independence into question. In like vein, if adequacy of response is measured in terms of tightening of regulation and procedure, introducing new layers of regulation and reorganisation of national teams then that has all happened in large measure in response to the reviews considered. However, this has not been without controversy. Princess Haya's term in office as FEI president was the most turbulent of any in the history of the organisation, the German National Federation's response to the 2008 Olympics was disproportionate, and neither they, nor their Irish equivalent, did anything to counter the unwavering rhetoric of 'cheating' when it was never established that more than confusion and lack of attention to detail had

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<sup>702</sup> Riach (n 28).

<sup>703</sup> Rumsby, Cuckson and Armytage, (n 25).

occurred. Furthermore, citing a dramatic decrease in detections<sup>704</sup> is not absolute proof that tighter regulation and enforced education programmes achieve anything because, as it is with crime, there will always be a ‘dark figure’<sup>705</sup> in relation to just how many transgressions there actually are. The number of capable individuals put off competing at the elite level by the draconian measures some SGBs have employed since 2008 is of similar concern. The strain of trying to operate legitimately under increasingly tight restrictions can be demonstrated by the near strike of horse racing jockeys over new whip rules in 2011.

If independence is considered in terms of independent thinking and adequacy of response in the same context, and this thesis argues that it should, then only the *Neville Review* in UK horse racing displays any kind of paradigm shifting vision. The concept of sports regulation not based on literal interpretation of detailed provisions in the common-law tradition, but on a set of principles interpreted in a purposive way, is new and untried. It is not without precedent in the wider legal context however. If thoroughly researched, and using the best drafting principles, that approach has the greatest chance of bringing an acceptable degree of due process, natural justice, and indeed human rights to sports involving equines.

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<sup>704</sup> Wendt (n 129) 75.

<sup>705</sup> The name given to the portion of crime in society which does not appear in the official statistics due to under reporting and under recording, see Newburn (n 60) Chapter 3.

## Chapter 7 – Problematising mitigation of the harshness of the current rules

*The wind of heaven is that which blows between a horse's ears* (Arabian Proverb)

### 7.1 Where does the answer lie?

This research has unearthed a paradigm shifting idea from a review into horse racing that has received little, if any, attention. The research question is *whether changes based only on a Gramscian critique of the governance of equine sports can substantially reduce the occurrence of integrity crises in equine sport*. It is therefore vital that alternatives to such a radical shift in thinking are considered. This chapter reviews whether there are other feasible models for addressing the inequities actually and potentially suffered by human athletes because of the regulatory *status quo* with regard to the non-human athlete part of the team.

#### 7.1.1 The introduction of fault at the liability stage in equine cases

The absence of any consideration of fault at the liability stage in any doping cases is an accepted paradigm and few will have any truck with a debate on this. This research has already highlighted the irony in this approach. A key plank in the arguments supporting strict liability is that SGBs and IFs with limited budgets would have too few resources to fight the liability phase on the basis of fault. The principle of presumed fault though, with inherent reverse burdens and standards of proof, simply commits those resources to fight the same question in relation to where the sanction should be on a continuum between a negligible or harsh one. It is hard to see therefore how money and effort are saved as the discussion could be switched to the liability stage by simple rewording of the regulations. It is still the case that expert evidence would be called and cross examination take place just as it does now in the sanction phase.

Another key argument is that fault is simply irrelevant in determining disqualification from an individual competition and forfeiture of winnings. It has been argued *supra* however that this is an oversimplification. It is not a 'given' that the presence of a substance has altered the performance or harmed the welfare of the horse. Traces of a prohibited substance can have such a negligible effect they ought to be ignored. Further, veterinary science in some cases is not in

agreement about the effects of certain substances especially in tiny quantities. This was highlighted in the CAS award on the *capsaicin* cases of 2008. If the performance is agreed by both sides to have been altered, then the question of fault should arise. If the substance was there by a genuine accident, then this is one of the ‘vicissitudes’ of life, and sport, to which CAS itself has referred<sup>706</sup>. This research has proven that the consideration of fault at the liability stage would make little difference to the resources to be deployed by an SGB. However, it has also proven that the ruling elite in any SGB or ISF relies on strict liability and its undisputed draconian repercussions as part of the ‘coercion’ required underpinning the ‘consensus’ that Gramsci identified the top of any social order requires to maintain that social order. As the military has it, it is always better to ‘fight on ground that you can win on’ so there is little to be gained by proposing the introduction of fault *per se* as an outcome of this research. There follows however a series of considerations of ways to mitigate the harshness of the presumed fault position.

### **7.1.2 ‘[W]e cannot, without blinding reason and cause, move one millimetre from strict liability...’<sup>707</sup>**

The discussions that follow analyse the statement made by Coe in an attempt to consider whether there are models which might allow some movement from pure strict liability, but which might still be acceptable to purists. These ideas range along a continuum and start from the extreme of considering a move away from prohibition to ‘public health’ style regulation. At the other pole are modifications to current regulatory provisions which have a precedent, in one form or another, in other arenas where strict liability is found, such as a ‘due diligence’ defence.

It might be argued that some sort of discretion rule would be a solution when strict liability produces injustice. This would need to be under a clear formula and there is a precedent in the sport of golf. Under the rules of the United States Golf Association (USGA), the principles behind Coe’s words are not strictly adhered to. Controversy still surrounds an incident which occurred on 12<sup>th</sup> April 2013 at the US Masters Tournament in Augusta, Georgia, United States.

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<sup>706</sup> CAS 94/129 *USA Shooting & Quigley v UIT*, Ground 14.

<sup>707</sup> Coe (n 58).



Internationally-renowned US golf professional Tiger Woods was handed a two-shot penalty for an ‘illegal’ ball drop after his shot hit the flagpole at the 15<sup>th</sup> hole and bounced into the water. Ultimately, Woods signed for an incorrect score with a ‘DQ’ as a result<sup>708</sup>.

The provision concerned is the USGA’s Rule 26-1 which, in essence, requires a player whose ball is in a water hazard to play the ball from a spot as near as possible to where the ball was last played and to suffer a penalty of one stroke<sup>709</sup>. The rule breach was compounded by the fact that it resulted in Woods signing for an incorrect ultimate score. The penalty for breach of this transgression is disqualification and these are strict liability provisions. Just as with the criminal law of Georgia, the federal United States and England and Wales, ignorance of the law is no defence, and irrespective of the fact that Woods appeared to be complying with the spirit of the game, he broke the letter of the rules and should have suffered a disqualification or ‘DQ’ as a result. The avoidance of the harshest application of this rule caused a great deal of debate, much of it drawing negative conclusions and this is evident in contemporary press reporting<sup>710</sup>. In attempting to resolve the issue, the USGA relied upon rule 33-7<sup>711</sup> which allows for a penalty of disqualification to be waived. This is rather a ‘one-off’ incident however, and this single example does not provide enough grounds to consider an FEI or BHA version. The USGA faced such criticism for this move that it is perhaps better not to pursue the idea any further. We should turn now to more widely discussed, and favoured, possibilities.

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<sup>708</sup> Jonathan Liew, ‘Tiger Woods given two shot penalty in The Masters 2013 for illegal drop on 15th hole’, *The Daily Telegraph*, (2013) available at <http://www.telegraph.co.uk/sport/golf/mastersaugusta> (accessed on 12/06/13).

<sup>709</sup> USGA Rules and Decisions for 2012-2015 available at <http://www.usga.org/Rule-Books/Rules-of-Golf/Rule-26/> (accessed on 12/06/13).

<sup>710</sup> See for example, Paul Haywood, ‘The Masters 2013: Tiger Woods leaves Augusta administrators between a drop and a hard place’, (London: The Daily Telegraph 13 April 2013) available at: <http://www.telegraph.co.uk/sport/golf/mastersaugusta/9992599/The-Masters-2013-Tiger-Woods-leaves-Augusta-administrators-between-a-drop-and-a-hard-place.html> (accessed on 12/06/13), Tiger Woods faces Masters investigation after ‘illegal drop’ claims, (London: The Guardian Online 13 April 2013), available at: <http://www.guardian.co.uk/sport/2013/apr/13/tiger-woods-masters-investigation> (accessed on 12/06/13).

<sup>711</sup> USGA Rules and Decisions for 2012-2015 available at <http://www.usga.org/Rule-Books/Rules-of-Golf/Rule-26/> (accessed on 12/06/13).

### 7.1.3 Prohibition or ‘public health’ style regulation?

Debates about whether to regulate performance enhancing drugs in sport instead of prohibiting them are inevitable. This is because of a similar polemic existing in relation to street drugs such as ecstasy, marijuana, cocaine, and heroin. There does seem to be a movement away from an absolutist approach to recreational drugs towards one of harm reduction which can be charted over the last decade or more. The political difficulties that a perceived softening of anti-street drug rules can raise have been thrown into sharp relief. Consider, for instance the well-publicised quarrel between Professor David Nutt and government ministers such as Home Secretaries Jacqui Smith and Alan Johnson<sup>712</sup>. In 2007, Professor Nutt published some controversial views in *The Lancet*<sup>713</sup>, for example, that the drug methylenedioxymethamphetamine (MDMA) or ‘ecstasy’ was statistically safer than (ironically for this research) horse riding. The reaction of the Home Office at the time was to distance itself from these views as they were perceived as potentially politically damaging. No contradictory scientific evidence of the same weight was put forward, instead rather moralistic statements were made. These chimed with Rolles’ view that ‘[p]rohibitionist rhetoric frames drugs as menacing not just to health but also to our children, national security, and the moral fabric of society itself’<sup>714</sup>. Ultimately Professor Nutt was removed from the Advisory Council on the Misuse of Drugs (ACMD) as a result of this long running disagreement culminating in the controversial article.

More recently however, key figures in local policing have publicly spoken in favour of the public health agenda in relation street drugs. The theory is that prohibition is not working and in some respects, is counterproductive. Specifically, it is the very illegality that is an attractor for some people which stimulates demand. In turn, illegality increases the risks associated with delivering the drug on the street which has an effect on supply, this is reduced and consequently price goes up. This in turn stimulates peripheral crime which is perpetrated to fund the addiction. Further

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<sup>712</sup> Mark Tran, ‘Government drug adviser David Nutt sacked’, (London: Guardian Online 30 October 2009), available at: <http://www.theguardian.com/politics/2009/oct/30/drugs-adviser-david-nutt-sacked> (accessed on 31/10/15).

<sup>713</sup> David Nutt et al., ‘Drug harms in the UK: a multicriteria decision analysis’ (2010), *The Lancet*, Vo. 376, No. 9752, 1558 -1565.

<sup>714</sup> Stephen Rolles, ‘An Alternative to the War on Drugs’ (2010), *British Medical Journal*, 341: 127-28.

there is the argument that a licensed and monitored drug taking culture is less likely to lead to deaths and illness from accidental overdoses, contamination or infections from unhygienic practices<sup>715</sup>. One such key figure in policing is the Chief Constable of Durham:

‘One of England’s most senior police officers has called for class-A drugs to be decriminalised and for the policy of outright prohibition to be radically revised... In a dramatic move that will reignite the debate over the so-called war on drugs, Mike Barton, Durham’s chief constable, has suggested that the NHS could supply drugs to addicts, breaking the monopoly and income stream of criminal gangs’<sup>716</sup>.

These statements won at least qualified support from two of the elected Police and Crime Commissioners (PCCs) in the region<sup>717</sup>, casting doubt on the sense in coining metaphors such as ‘war’ when defining drugs policy. In 2014, there was a sea-change in that there was, after 40 years of policy linking harsher penalties with fighting drug use, an evidence-based Home Office study<sup>718</sup>. This made international comparisons with Uruguay, Colorado, the United States and Portugal, each where some degree of legalisation is in place, concluding that there was no evidence that ‘tougher’ sentencing has any impact on the use of illegal drugs. The findings were particularly welcomed by the Liberal Democrat party, in power with the Conservatives at the time. They had made a ‘2010 election pledge for a Royal Commission to examine the alternatives to current drug laws’<sup>719</sup>.

The analogy between the earlier approach to the misuse of drugs in wider society and the current hegemony regarding PEDs in sport is striking. The common factors are that the respective anti-

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<sup>715</sup> Newburn (n 60) 495.

<sup>716</sup> Henry McDonald, ‘It’s time to end the war on drugs says top UK police chief’, (London: Guardian Online 28 September 2013), available at <http://www.theguardian.com/society/2013/sep/28/time-end-war-drugs-uk-police-chief> (accessed on 01/11/15).

<sup>717</sup> ‘Chief constable: War on drugs has comprehensively failed’ (Northern Echo Online 30 September 2013) available at: <http://www.thenorthernecho.co.uk/news/10706142.print/> (accessed on 01/11/15).

<sup>718</sup> ‘Drugs: International comparators’, Home Office, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368489/DrugsInternationalComparators.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf) (accessed on 16/10/2015).

<sup>719</sup> Alan Travis, ‘Punitive drug law enforcement failing, says Home Office study’, (London: Guardian Online 30 October 2014), available at: <http://www.theguardian.com/society/2014/oct/30/punitive-drug-laws-are-failing-study> (accessed on 16/10/15).

street drug and anti-PED campaigns work with ideals and not with pragmatism, and partisan, – often moralistic – viewpoints are presented as truth. Marx commented on the tendency for a population to accept prevailing social conditions as inevitable<sup>720</sup> and presenting certain ‘truths’ to the populace is key to that. The war on (street) drugs is presented as necessary to fight the ‘evil’ of addiction and attendant problems, yet entirely legal (but regulated on the grounds of public health) alcohol and tobacco continue to claim thousands of deaths each year. This is far in excess of those from illegal drugs<sup>721</sup>.

In sport, there are also commentators calling for an end to prohibition of PEDs and the creation of some sort of framework for regulating them. This is largely, but not exclusively, to enhance the quality of the drugs and thus reduce the risk of harm to athletes. Some of the following points have already been considered in relation to the debate on strict liability in sport earlier. In 2004 Savulescu made a proposal that PEDs should be allowed in sport to ‘level the playing field’<sup>722</sup>. This was restated in 2013 in the *British Medical Journal*<sup>723</sup> and relies on an argument that the use of PEDs is difficult to construct as cheating when one considers that certain athletes are born with larger lungs or stronger hearts and the PEDS simply allow those without these genetic benefits to compete. Anderson takes a similar view, but using much more of a criminological approach. This entails investigating deviance and its causes in a dispassionate manner, citing among others a Spanish five-time Tour De France winner with a lung capacity of eight litres compared to the usual six<sup>724</sup>. This illustrates that PEDs simply allow the ‘genetically unfit’ to compete. Anderson, who is also a CAS arbitrator, cites Rolles in his study of the harms of prohibition of hard drugs such as heroin from 2010<sup>725</sup>. Rolles argues that the problems of prohibition outweigh the benefits and advocates a harm reduction policy agenda in relation to

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<sup>720</sup> Wolcher (n 69) p xvi.

<sup>721</sup> Newburn (n 60) 520.

<sup>722</sup> Savulescu (n 137) 668.

<sup>723</sup> Julian Savulescu et al., ‘Should athletes be allowed to use performance enhancing drugs?’ (2013) *British Medical Journal*, 347 available at <http://www.bmj.com/content/347/bmj.f6150> (accessed on 01/11/15).

<sup>724</sup> Anderson (n 137) 151.

<sup>725</sup> Rolles (n 714) 341.

street drugs. Anderson also postulates that there is a direct analogy between the control of recreational drug use and anti-PED rules<sup>726</sup>.

Anderson makes some useful points in relation to the cost effectiveness of the prohibition regime. Real doping cheats are determined and Anderson points out that, 'because doping is mainly confined to the elite professional level, where the financial rewards...are such that athletes are willing to endanger their health, attempting to monitor such highly motivated participants is a costly and ultimately futile pursuit'<sup>727</sup>. Anderson goes on to say that the perception among the sporting public is that only the 'unlucky or pharmaceutically unsophisticated' get caught<sup>728</sup> despite an annual estimated global £300 million spent on detection and sanction. The resolve of cheats and lack of concern for the consequences of taking PEDs can be startling. Famously, Goldman and Klatz found that more than half of elite athletes would take a PED which was undetectable and guaranteed success in their sport even if it ultimately resulted in death within five years<sup>729</sup>.

There is evidence then that committing huge resources to fighting the use of PEDs has not had the effect of appreciably limiting these practices, nor has it done much to address negative public perceptions about integrity in sport. These arguments might be a foundation for a serious debate about whether a public health style regulation could be a way forward for human-only sport. Anderson's views are well argued and thorough as far as they go, but his treatment cannot be considered complete because it assumes that the athlete in question will always be human. Control, rather than prohibition, of PEDs does not take account of the lack of autonomy nor the vulnerability of the horse-athlete. As earlier pointed out with respect to strict liability and animal welfare, if half of a representative sample of athletes would risk their own death in order to win, then what price the life of a horse? It might be more cost effective to control rather than prohibit PEDs in horses, in addition there is an argument that the 'playing field' is not level in equine-based sports either. Wealth will enable the best horses to be bought and thus medals won.

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<sup>726</sup> Anderson (n 137) 149.

<sup>727</sup> *Ibid.* 141.

<sup>728</sup> James Connor and Jason Mazanov, 'Would you Dope? A General Population Test of the Golden Dilemma' (2009), *British Journal of Sports Medicine* 43: 871-72 cited in Anderson (n 137) 141.

<sup>729</sup> Goldman and Klatz (n 478) and Goldman and Klatz (n 137).

However, a naturally skilled footballer born in a Brazilian favela or South African township can hone their skills with a \$5 football to the point where they are picked up for a top level professional career. The equivalent is not true in equestrianism; competing at the elite level requires huge investment, wealthy connections, or family already successful in the sport much as it does in such as Formula One racing. There is some logic to allowing a careful regime of medication to try to level out these apparent inequities, however there is too much danger that horses might be viewed as expendable in the pursuit of victory and the financial rewards that go with that. A move to a ‘public health’ rather than a prohibitive stance by regulators would mitigate the harshness of strict liability in that where it remained it would be applied only to serious transgressions because the taking of PEDs would have been liberalised in the course of being controlled and monitored. The risk to horse athlete health is too great however to take that particular path.

#### **7.1.4 ‘Due diligence’, what can be learned from other anti-corruption mechanisms?**

In a 1996 study, it was discovered that in English criminal law, roughly half of all strict liability offences had some sort of ‘due diligence’ defence<sup>730</sup>. McCutcheon<sup>731</sup> discusses a kind of excusal based on similar thinking, under Australian law and supported by *He Kaw Teh v The Queen*<sup>732</sup>. He notes that this approach has not gained much traction in English jurisprudence however, but that Canada has been prepared to adopt a wider, ‘due diligence’ defence in criminal law.<sup>733</sup>

This section will consider whether such a defence could operate in strict liability rule breaches in equine-based sports. Abandoning strict liability altogether in doping in sport would indeed be a paradigm shift of seismic proportions, something the ‘rulers’ of equine sport would have a hard time accepting. In common with the preceding section, the approach taken here is to suggest modifications which go to alleviating the harshness of the rule while leaving it in place.

It might be possible to draw from statute and from the world of international commerce to mitigate the worst effects of strict liability without introducing an element of *mens rea* into the

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<sup>730</sup> See Ashworth and Blake (n 388).

<sup>731</sup> McCutcheon (n 411) 53.

<sup>732</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523.

<sup>733</sup> McCutcheon (n 411) 61.

wording of the EADCMRs. There is a useful precedent in modern anti-bribery legislation in the UK. Developments in the law designed to counter commercial corruption have much in common with the FEI's anti-doping rule structures and indeed with the BHA's anti-corruption regulations. It is recognised that the commercial world suffers from a scourge of corruption which threatens to destabilise the 'level playing field' that business ought to operate on. At the extreme, corruption is 'at the grand level in the form of bribes by businesses to domestic and foreign public officials that is seen as causing the greatest harm to a country in terms of economic growth and high levels of poverty'<sup>734</sup>. Sport also suffers from the 'scourge' of doping, and, to a growing extent fixing, both of which are felt to be at odds with long-cherished Corinthian Ideals around sporting fair play.

Governments have been less reluctant in regulating commerce using statute than when they are asked to do so in relation to sport. As a result of pressure from the Organisation for Economic Co-operation and Development (OECD), the Bribery Act 2010 came into being. For Engle, the OECD had expressed the view that the UK was a particularly 'soft touch' where corruption was concerned<sup>735</sup>. In as much as WADA, the FEI, the BHA, and other SGBs operate within a global context, within the concept of *lex sportiva* utilised in this research (see Chapter 5) there is a further commonality which makes comparison with the Bribery Act useful. The Act operates within the framework of *lex mercatoria*, this is the concept of a global merchant law drawn from the fact that much trade occurs internationally, i.e. between natural or juristic persons who are subject to different legal systems. Lando describes the process as when:

‘...parties to an international contract sometimes agree not to have their dispute governed by national law. Instead they submit it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade or to those States which are connected with the dispute.

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<sup>734</sup> Indira Carr and Opi Outhwaite, 'The OECD Anti-Bribery Convention Ten Years On' (2008), 5 *Manchester Journal of International Economic Law* 3, 3, available at: <http://epubs.surrey.ac.uk/578/1/fulltext.pdf> cited in Eric Engle, 'I Get by with a Little Help from my Friends? Understanding the UK Anti-Bribery Statute, by reference to the OECD Convention, and the Foreign Corrupt Practices Act', (2011) *The International Lawyer* (American Bar Association), Vol. 44, 1173.

<sup>735</sup> OECD, *OECD Group Demands Rapid UK Action to Enact Adequate Anti-Bribery Laws*, Paris, 16 October 2008 available at: [http://www.oecd.org/document/8/0,3343,en\\_2649\\_34855\\_41515464\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/8/0,3343,en_2649_34855_41515464_1_1_1_1,00.html) cited in Engle (n 734) 1184.

Where such common rules are not ascertainable, the arbitrator applies the rule or chooses the solution which appears to him to be the most appropriate and equitable<sup>736</sup>.

Lando considers *lex mercatoria* a judicial process, but one which is partly an application of legal rules and partly a selective and creative process<sup>737</sup>. One global body, the OECD, provides the impetus for specific regulation of corruption within a sector and attempts to stimulate a series of statutory measures in a domestic regime that counter commercial corruption. These measures contain within them the ability to mitigate the harshest effects of the provisions with a limited defence. The question is whether equine-based sports' SGBs and ISFs, operating as they do in a global environment, could benefit from a version of these measures.

Like sport, in global business there is no international statute, only a nexus of contractual arrangements, in some cases underpinned by treaty. Engle's comments support the notion of wider applicability of these ideas, further justifying the use of anti-bribery laws as a useful example for international sport;

'The model of shaping and enforcing an international norm described here can be applied to other international governance issues. The experience of the anti-bribery convention could be applied to the fight against pollution, for example'<sup>738</sup>.

Other attempts to tackle bribery and corruption on an international level include the US Foreign Corrupt Practices Act (FCPA)<sup>739</sup>, which also operates in the international sphere. In so doing, this legislation requires 'dual criminality' i.e. for a conviction the act in question must be illegal in both the US and the foreign jurisdiction concerned in the corruption allegation. The FCPA does not have any strict liability provisions within it, however *mens rea* concepts such as 'knowledge' and 'belief' are sufficient<sup>740</sup>. This makes convictions more likely than if, say, intention was to be required as this by comparison is more difficult to prove.

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<sup>736</sup> Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) *International and Comparative Law Quarterly*, Volume 34, Issue 04, October, 747.

<sup>737</sup> *Ibid.*

<sup>738</sup> Engle (n 734) 1176.

<sup>739</sup> See US Department of Justice <http://www.justice.gov/criminal/fraud/fcpa/> (accessed on 20/08/13).

<sup>740</sup> Engle (n 734) 1177.



Another good reason for the specific use of the UK Bribery Act 2010 for as a comparator here however is that it attempts to cater for corrupt practices carried out by third parties at ‘arm’s length’ from the ultimate benefactor. It is irrelevant whether the third-party acts in a genuine attempt to assist the accused organisation, acts in pursuit of his own ends, or simply acts in an unprofessional or incompetent way without thought. In a sporting context, the same discussion might arise over the actions of a malicious or, alternatively, thoughtless stablehand at a horse’s destination prior to competition. In Section 7 Bribery Act 2010 it is an offence for a:

‘relevant commercial organisation’ if a ‘person associated’ with it ‘bribes another person intending to obtain or retain business for’ the commercial organisation or to ‘obtain or retain an advantage in the conduct of business for’ it.<sup>741</sup>

For a finding of guilt therefore it is quite immaterial that the commercial organisation has any knowledge at all of the corruption. By way of example, say, company A, a commercial language school based in Bristol, UK, engages B, an agent in Beijing, to procure students for it. After that, B, without any encouragement from or the knowledge of A, offers bribes to local officials to facilitate access to and recruitment of those students. Company A would in that circumstance be liable to conviction. The same result would be true if the act complained of was done through all good intentions but was a naïve act, one that was carried out through want of care or attention to local laws and rules. This would occur for example if there was ostentatious and lavish entertainment of the same officials rather than a direct cash payment<sup>742</sup>. S6(3) defines bribery as the act of directly or through a third party, [offering, promising or giving] any financial or other advantage [not necessarily cash] to the official when the giving of that advantage is not permitted by local law<sup>743</sup>.

Considering the *Al Eid* and *Sharbatly*, case, there is a direct analogy that can be made. None of the KSA team knew that a careless act, which had the potential to be seen as one of corruption,

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<sup>741</sup> Bribery Act 2010 s7(1)(a) –s7(1)(b)

<sup>742</sup> Ministry of Justice Bribery Act Guidance available from:

<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> p12 (accessed on 23/07/13).

<sup>743</sup> S 6(3) Bribery Act 2010.

had been carried out on their behalf, thousands of miles away. As has been established, there is currently no defence to a scientifically correct positive analytical finding. There is only the possibility of a partial defence in that the sanction may be mitigated. Under the Bribery Act 2010 however, a commercial organisation, although subject to strict liability, has an important defence which comes into play. This operates to potentially mitigate the harshness of a situation where an agent goes on a ‘frolic of his (or her) own’. Crucially it states in section 7(2):

‘it is a defence [for the commercial organisation] to prove that [it] had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct’,<sup>744</sup>.

This is the so called ‘due diligence defence’ a version of which could be adopted in equine cases. The Ministry of Justice publishes guidance, mandated by section 9, to help interpret what ‘adequate procedures’ might be<sup>745</sup>. As in global sport, in international commerce there are a vast array of different organisations operating under different conditions and different local arrangements. It is unsurprising therefore that the guidance is quite wide, non-specific, and is centred on principles rather than literal wording. It encourages the adoption of good policy rather than laying down rigid codes, albeit with some acknowledgment of prevailing evidence law. At page 15, the guidance specifically states:

‘...the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities’<sup>746</sup>.

Advice on what ‘adequate procedures’ might be however gives six broad principles<sup>747</sup> that an organisation should adhere to in order to satisfy the requirements of the defence in section 7. ‘Principle 1’ suggests ‘proportionate procedures’, in other words that the ‘organisation’s

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<sup>744</sup> *Ibid.*, S7(2).

<sup>745</sup> Ministry of Justice Bribery Act Guidance available from:

<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> accessed on 23/07/13.

<sup>746</sup> Ministry of Justice Bribery Act Guidance available from:

<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> p15 (accessed on 23/07/13).

<sup>747</sup> *Ibid* pp21-31.

procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced'. 'Principle 2' encourages 'top-level commitment' or that the '...top-level management of a commercial organisation...are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable'. 'Principle 3' covers risk assessment and advises that the '...commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed, and documented'. 'Principle 4' is the due diligence principle from which the defence takes its name suggests procedures that take '...a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks'. 'Principle 5' advises adequate training be in place throughout the organisation and 'Principle 6' that monitoring and review procedures are robust<sup>748</sup>. The intended overall effect of these principles taken together is to foster an environment within which bribery and corruption are much less likely to take root.

The above are not lists of prohibited acts or processes, rather a series of interlinked themes which are intended to promote cultures which are not conducive to corrupt behaviour. Apart from anything else, these principle-based provisions are further examples of integrity protecting rules which are not based on the literal wording of detailed provisions, but are much wider. In doing so they go to heart of whether an organisation is corrupt or not, and have much in common with what Dame Neville proposed for the Orders and Rules of Racing in 2008.

There is little case law on how the Bribery Act works in practice, but academic commentary as to how well the Bribery Act sits with similar provisions in other jurisdictions is useful. Again, for Engle, 'Corruption is a problem – a transnational problem...[c]orruption represents an increased transaction cost, a distortion of economic signals, a lack of transparency, an obstruction to free trade, and a source of inefficiencies<sup>749</sup>'. These themes can be bundled together and termed a

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<sup>748</sup> *Ibid.*

<sup>749</sup> Engle (n 734) 1175, see also Carr and Outhwaite (n 734).

‘warping’ effect in respect of international commerce. Such an effect is also said to be caused by doping and other cheating in sport across different jurisdictions. Engle does cast doubt on the efficacy of the Bribery Act however, taken as a whole, criticising it in terms of its vagueness and prefers the US FCPA. This is unsurprising in that the FCPA has had far longer to develop, as has the associated case law. Engle does though welcome the move towards a more international approach to combat a common enemy:

‘...despite the flaws – ambiguity and overreach – the [UK] Act is a “hopeful monster”. First, the legislation represents another example of the success of functionalist method. Second, the statute represents an example of the power of non-binding soft law as a “strange attractor” for obligatory compliance’<sup>750</sup>.

One outcome of the framework of which the Bribery Act 2010 is a part is that, as a whole, it helps to promote compliance with a set of norms and values that are universally agreed to be desirable as well as the Act itself being hard law. At the moment, the unswerving reliance on strict liability and the continued emergence of ‘crises’, even spreading to the amateur level<sup>751</sup>, risks a loss of credibility and faith in sports integrity regulation. For Straubel, these are *quasi*-criminal matters because, in addition to the scorn of the athlete’s peers, the accusations of moral turpitude ‘being levelled against the athlete, the penalties being imposed, and the indicia of the system’ are all indicators. He goes on to say that, ‘...[i]f athletes are not afforded the protections of the criminal system, the stability, legitimacy, and effectiveness of the doping control process will always be in jeopardy...’<sup>752</sup>. Straubel is further concerned that harsh treatment will not only reduce support among athletes, but also the ticket buying public. Winning (and keeping) ‘hearts and minds’ is absolutely crucial in keeping sport fair.

#### **7.1.4.1 A ‘due diligence’ defence for equine sport teams?**

We should consider here what the wording of a due diligence defence would look like, and how it would operate. It would not be practical for a rider alone to carry out due diligence on an

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<sup>750</sup> Engle (n 734) 1185, see also Gunther Teubner, *Autopoietic Law: A*

*New Approach to Law and Society*, European University Institute - Series A, (Berlin: De Gruyter 1988).

<sup>751</sup> ‘State of Sport: Amateur doping findings ‘concern’ sports minister’, (BBC Sport Online 20 March 2017) available at: <http://www.bbc.co.uk/sport/39329184> (accessed on 21/04/17).

<sup>752</sup> Straubel (n 426) 569-570.

ongoing basis while competing at the elite level across the globe, with much travelling and training involved. This opened up the question, not yet considered by this research, as to exactly who should be the person, or persons, who should shoulder the liability for a doping infraction.

#### **7.1.4.1.1 The exculpated and those ‘for whom the bell tolls’**

The rider would be held accountable under the current regime of presumed fault and would face a tribunal, much as Al Eid and Sharbatly did in the case study presented earlier. Further, if one were to design regulations such that a team or management tier could be held liable together, there is a precedent for this type of liability. Enterprise liability has been a feature of UK tort law since *Lister v Hesley Hall Ltd* [2001] UKHL 22 which allowed liability for sexual abuse in a children’s home by a member of staff to fall on the corporation as a whole. In Canadian law, *Jacobi v Griffiths* [1999] 2 SCR 570 came to a similar conclusion and in the United States (New York), the doctrine, a species of vicarious liability, was explained and justified in *Hall v. El Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972) where it was sought to place liability on virtually the whole blasting cap industry for injuries to children in separate incidents across the country.

There is now something very similar underpinning the Bribery Act itself. Section 7 places liability on a ‘relevant commercial organisation’ if a ‘person associated’ with it ‘bribes another person...’<sup>753</sup> such that the separate legal entity of the company, or possibly a group of partners, would be liable for the unknown acts of a third party, possibly overseas. Under the Corporate Manslaughter and Corporate Homicide Act 2007, Section (1) mandates that ‘An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised; (a) causes a person’s death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased’<sup>754</sup>. Further, that liability can apply to; a corporation, a number of government departments listed, a police force or a partnership, trade union or employers’ association, that is an employer<sup>755</sup>. This is strong evidence that a form of enterprise liability can be said to exist in criminal law too. It is asserted here that sports integrity

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<sup>753</sup> Bribery Act 2010 s7(1)(a) –s7(1)(b)

<sup>754</sup> Corporate Manslaughter and Corporate Homicide Act 2007, Section (1).

<sup>755</sup> *Ibid.* Section (2).

regulations and procedures are *quasi*-criminal because of their punitive nature and the morality and ethics which underpins them. Therefore, it seems quite logical that the proposed regulatory framework could exonerate the rider while placing liability on the remainder of the yard or sporting operation as having allowed the infraction to occur collectively. In such a situation, the due diligence would have to be such that was reasonable to expect that a rider as an individual could carry out, much as a pilot is expected to carry out pre-flight checks before taking off but not to service the engines. This would protect the rider and one of the protections available in criminal law that Straubel argues should be allowed for athletes<sup>756</sup>, would be in place.

It may also be that in some situations the defence could potentially operate to exonerate the whole team – including vets, physiotherapists, grooms, logistics professionals, and management group. This, of course, as long as the threshold for diligence has been met. This would be when a person acted outside their collective direct control, such as in the Al Eid and Sharbatly cases. In such a situation, the person who acted without due care at the point of contamination would be the focus of proceedings. Even if they were not a member of the relevant SGB, they could be brought under the purview of the regulations via the ‘contractual nexus’ mentioned before. Alternatively the FEI regulations could be widened to the scope that the BHA has with regard to persons subject to their regulations. In the Al Eid and Sharbatly case, the blame and sanction would fall on the staff member responsible for cleaning the stables that *Vanheouve* and *Lobster* 43 were received into. Disqualification would likely happen unless the traces were infinitesimal, but no moral stain would fall on the rider, or in that instance, the KSA national team. In the case of *Estimate*, apart from disqualification, the proceedings should be deflected towards the negligent feed supplier by means of the due diligence defence. This could happen again via the ‘contractual nexus’ or by the BHA banning its representatives from racecourses under current rules. If one were awarded, this would potentially be a very strong sanction because of the public relations damage and the difficulties that would entail if the company carries out marketing on racecourses.

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<sup>756</sup> Straubel (n 426) 569-570.

There are still doping and unlawful medication situations in which this new defence might not succeed. For instance, a sanction might well still be placed on an equestrian before a tribunal on facts similar to the occurrences at the horse racing Godolphin stables during June 2013 (see Fig. 10). The BHA's verdict on management practices at Godolphin was damning:

‘[t]he British Horseracing Authority has issued a devastating criticism of the way Sheikh Mohammed's Moulton Paddocks was run, saying Godolphin's woefully inadequate management structure allowed rogue trainer Mahmood Al Zarooni to carry out the most audacious doping programme racing has ever seen, under the noses of his bosses’<sup>757</sup>.

A due diligence defence is unlikely to be accepted in such a case, whether in an FEI sport, horse racing, or any other equine-based sport. Where a system of management has failed to this degree, there are no ‘adequate procedures’ in place and a ‘conviction’ for a doping offence would still fall on the same person as it does now.

#### **7.1.4.1.2 The detail**

This section will now consider what framework a defence specific to equestrians, but operating in a similar way to that under the Bribery Act, might have. This proposed defence specifically regulates the extent to which a person may mount a defence to the charges laid against them, in contrast to the proposed discretion rule discussed above which gave parameters as to how the tribunal could operate. Consequently, in this instance the logical location for such a provision would be in the EADCMRs themselves. It is proposed that a new Article 3.3 be inserted in the CMR section of the EADCMRs with a corresponding section at 3.3 of the EAD rules. Such an article would read as follows:

#### ‘Article 3 Proof of *ECM Rule* Violations

##### 3.1 Burdens....

##### 3.3 ‘Due Diligence Defence’

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<sup>757</sup> J. McGrath, ‘Godolphin management blasted by British Horseracing Authority report into drug scandal’ (London: Daily Telegraph Online 25 July 2013) available from: <http://www.telegraph.co.uk/sport/horseracing/10202168/Godolphin-management-blasted-by-British-Horseracing-Authority-report-into-drug-scandal.html> (accessed on 21/08/13).

Any proven ECM rule violation is presumed to have been carried out by the accused person/s and/or member of their support personnel or an associated person due to the accused person/support personnel's express or implied request, instruction or acquiescence.

The accused person can rebut this presumption by proving on the balance of probability that adequate procedures were put in place by:

- a) Themselves, or;
- b) The sports team or organisation to which they belong;

Which were designed to prevent such violations by associated persons.

#### 3.3.1 Guidance on 'Adequate Procedures'

The *FEI* must publish and from time to time and as appropriate revise, guidance about procedures the individual or team in 3.3 can put in place to prevent ECM rule violations. The accused person must prove on the balance of probabilities that the procedures raised by them as a defence under 3.3 are adequate according to that guidance.'





**Figure 10 – Mahmood Al Zarooni at his hearing in London.**

This proposed defence is heavily influenced by the wording of the Bribery Act 2010, but goes no further than the parameters of section 7 therein. That defence caters for the acts of a third party acting without orders or negligently in commercial dealings. This sporting version caters for the wrongful acts of third

parties working on behalf of equestrians, owners, and trainers as seems to have been the case with Al Eid and Sharbatly. The limits placed on the drafting proposed above are important ones. In order to gain wide acceptance in the sector, it is most important that the defence must not even appear to give *carte blanche* to owners, trainers, and riders who wish to deliberately flout the rules and then hide behind assurances that adequate systems were in place, but rogue operatives were at fault. If this contention were laid, it could be countered by the point that if procedures are rigorous enough and follow the guidance produced, rogue personnel are much more likely to be exactly that – rogue – and not acting at the behest of the person before the tribunal.

It is not intended to fully draft out here what any potential guidance might be, as this would involve very detailed work and would only serve as a distraction from this current discourse. It would be better to follow the example of the UK Ministry of Justice (MoJ) in relation to bribery and group the guidance around a range of principles. The logic for doing this comes in part from the common themes in the mischief both are aimed at countering. Taking all the foregoing into account, the proposed anti-doping ‘principles’ should be drafted along the following lines, offered as examples:

### Principle X

‘Proportionate procedures’ to prevent doping and controlled medication violations by persons associated are proportionate to the doping and controlled medication violation risks faced, the nature, scale and complexity of the accused’s sporting activities. In the case of an organisation, they are also clear, practical, accessible, effectively implemented and enforced.

### Principle Y

‘Top-level commitment’ of the sporting operation or team management to prevent doping and controlled medication violation by persons associated with it. They foster a culture within the organisation in which doping and controlled medication violations are never acceptable.

The Bribery Act defence operates to clear the corporation if successfully raised if there is wrongdoing by a rogue individual operating at arms-length from the business. It does not place the onus on any one individual to carry out due diligence. In the case of the equine sports version, there would be an onus on the rider if he or she were raising it, so it must take into account the ability of an individual to carry out such a task. If a team were raising the defence, the threshold must be higher therefore. In the case of a team or sporting organisation, requirements would need to be in the form of education, policy, and procedures, whereas a rider would be expected to have carried out more basic, but common-sense checks. These might include ordinary on site visual checks, asking sensible and prudent questions, and recording those in a log and so on.

This, of the three proposals in this chapter, is the most attractive. That said, it is placing a ‘gloss’ on what is a demonstrably flawed framework with clear systemic failings. From a *radical humanist* perspective, this is unsatisfactory. An escape from under the current inequities may well be required rather than a tinkering exercise that this is. While the due diligence defence is the best of the findings so far, it must therefore be rejected here as insufficient on its own to address the wide-ranging problems discovered during this research. There is nevertheless groundwork in this section for further research, and the proposal is strong enough to be an

interim step, especially given that persuading equine sport as a whole to accept a new *weltanschauung* is so fraught with difficulty.

## 7.2 Conclusion

In drafting terms, the introduction of fault-based liability in horse sport regulations as they are is the simplest solution, especially given that fault is already considered, to a specified standard of proof, at sanctioning stage. The political difficulties of such a move make it most impractical however, and consideration must be given to ways to mitigate the worst effects of strict liability.

Having discounted any move to regulate rather than prohibit PEDs for horses, this chapter has considered mainly one alternative way to mitigate the strict liability aspects of the EADCMRs in particular. Much of the commentary, however, could apply in principle to the full range of equine-based sports. With the ‘due diligence’ defence, there is a very strong analogy between sporting rules designed to counter doping and controlled medication infractions and anti-corruption legislation. They are both designed to counter a ‘scourge’ which does not respect jurisdictional boundaries and has a warping effect on what should be a level playing field, destroying integrity and faith in the process. It seems logical then that some of the ideas developed in the field of *lex mercatoria* could also be employed within what there is of a true *lex sportiva* in equine sport. Legal developments encouraging incremental changes in broadly held attitudes towards corrupt practices must be welcome. This must be so in the arena of international sport as much as it is in international commerce. Specifically, the adoption of a defence of ‘due diligence’ in the form discussed earlier would mean that athletes like *Al Eid* or *Sharbatly* might not have been found guilty of the offence of doping at all. Those convictions largely rested on the activities of an unbidden third party in thousands of miles from the person who ultimately was sanctioned. This finding was always probable given the strict liability aspects of the rule. In such cases, it is submitted here that an approach which exonerates someone who has strenuously, yet ultimately unsuccessfully, tried to avoid the commission of the violation is more in keeping with the protection of fundamental rights than the *status quo* is. This echoes a view on those exact issues expressed by the Canadian Supreme Court in

considering strict liability criminal offences and human rights.<sup>758</sup> Further, considering Straubel's concerns, it is more likely to promote faith in, and support for, the rules and procedures themselves rather than simply fear of them.

This research has however taken a *radical humanist* approach from the start and the view is that radical change is necessary to avert the recurrent 'crises' in the research question. The due diligence defence simply arms the accused person to defeat presumed fault. The problem is that this very concept has been shown time and again in this research to be fundamentally inequitable. This is particularly so in equine cases, but it also serves to shore up the 'rulers' of equine sport in their 'social' position within the SGB or IF. Thus, taking a Gramscian perspective, 'revolution' is preferred to evolution.

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<sup>758</sup> *B.C. Motor Vehicle Reference* Supreme Court [1985].

## Chapter 8 – Conclusion

*‘Courage is being scared to death and saddling up anyways’* (John Wayne)

### 8.1 Findings from the research question

The research question is *‘Can changes based on a Gramscian critique of the governance of equine sports substantially reduce the occurrence of crises in integrity for human participants?’*

There are several layers implicit in this question. Firstly, why equine sports governance is unable to tackle growing numbers of integrity ‘crises’ with the regulations and procedures as they currently are. Secondly, why those regulations and procedures have not been subject to radical overhaul despite the failings illustrated by this research. Finally, what changes based on a Gramscian critique would address the problems highlighted in this thesis.

In carrying out the research, no evidence was found that required a re-working of the research question. The following sections will summarise the considered response to the question before making any recommendations.

#### 8.1.1 Equine sports and ‘due process’, ‘human rights’ and ‘natural justice’

The genesis of the study was that *prima facie* there is a fault line between sports involving only human athletes and those involving human/non-human athlete teams, i.e. equine sports. However, with little or no dissonance, the same type of governance and the same type of regulation have been applied to a broad swathe of sports involving human and non-human participants as if they were a homogenous whole. There is clear and present evidence of the potential for ‘miscarriages of justice’. The term is used deliberately despite these decisions being made, in the main, by international social orders instigated and run by non-state actors<sup>759</sup>. The repercussions can be so draconian and far-reaching for sports participants. The distinction between disciplinary awards and criminal sanctions applied by a state are more apparent than real. Put another way, the fact that these regulations and arbitral systems exist outside state legislatures and judicial procedures in no way diminishes the potential impact of the sanctions. A gymnast who receives a doping ban of two years may not ever be able to compete at elite level

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<sup>759</sup> See Walker (n 16) 373-396.

again because of the relatively short nature of their careers. This results in a destroyed livelihood from which recovery may never be possible. This is comparable with a ban on a person holding the office of director<sup>760</sup> or the effect of most criminal convictions, other than traffic violations, on the career of a secondary school teacher<sup>761</sup> or a police officer. Even participants in sports who can realistically expect their careers to be much longer (equestrians for instance can compete from their teens to their sixties, if not beyond) can suffer disproportionate consequences. Furthermore, a previous adverse analytical finding has an effect on which procedure may be utilised in future allegations under the FEI's EADCMRs. The 'fast track' procedure is no longer available and this is a tangible consequence similar in effect to having a criminal record. None of this would matter if an adverse analytical finding was always the result of a person *cheating*, but this is demonstrably not the case.

### **8.1.2 Re-imagining the horse as athlete**

Taking a *radical humanist* approach to the study of the research question, and the Gramscian perspective implicit in that, the basic notions which underpin the regulation of horse sport have been questioned. One flawed building block of the provisions and processes as they currently stand is that the WADA Code derivatives and similar have been transplanted to horses. Yet the presence of an adverse analytical finding in a horse causes fault to be presumed in the rider as if the horse were a piece of equipment such as a bobsleigh or pair of sallopettes. Those particular examples have to conform to rules at the Winter Olympics, but are inanimate objects. This, despite the academic literature, sporting rules, and even emanations of CAS referring to horses as 'athletes'. If they are indeed athletes, as anything other than a term of art, then such transplantation is illogical as they can have no autonomy and so a major assumption underlying strict liability is not applicable. This research examined the true modern social construct of the horse looking at its place in sport, commerce, entertainment, popular culture, and military history. The latter was included because it pertained to the special relationship between horse and rider in sports which derives from services training. Together, this proved that the social construct of the horse as athlete was capable of substantiation with considerable volumes of

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<sup>760</sup> Company Directors Disqualification Act 1986, for example ss 2-5.

<sup>761</sup> Teaching and Higher Education Act 1998, s6 and Schedule 2.

evidence. Taking the new social construct of horse *qua* athlete into account is vital in arguing that the way horse sport is regulated requires fundamental change and not just amendment.

### 8.1.3 Examples of miscarriages of justice

It is not hard to find examples to explain that an equine, or any positive analytical finding is not always cheating. Just like *Răducan* and *Baxter* in human-only sport, *Mullins v MacFarlane*<sup>762</sup>, the 2008 capsaicin cases arising out of the Games, *Al Eid* and *Sharbatly v FEI* just prior to the London Olympics, Jock Paget's disqualification from Badminton in 2013, The Queen's racehorse *Estimate* in 2014, all do not meet an evidential burden establishing a dishonest intent to cheat. Furthermore, this research has shown a disqualification from a specific past event is also a *de facto* sanction, just as much as a ban from subsequent events, such is the moral opprobrium and financial loss that flows from that. It is simplistic to say that in *all* cases a human or non-human athlete should even be disqualified, never mind suffer a ban, just because of the presence of a trace of a banned substance, there must be a more effective *de minimis* provision. This is especially so when the performance or welfare effect of the substance is negligible or disputed by the scientific community. If there is a performance enhancing or welfare harming effect there must be a disqualification, but the key to a future ban should always be, was there moral fault? If a human or a horse ingests a microbe accidentally, is unwell, and does not perform to their best, that is an accident which benefits the other competitors. If a human or horse accidentally ingests a performance enhancing substance, the opposite is true, there is no ethical or practical difference between the two scenarios.

It is clear that the EADCMRs, in common with all other versions of the code and the BHA Orders and Rules of Racing, appears unable to distinguish between cheating, poor event preparation, and accident. Being ill-prepared and failing to counter chance do not require any dishonest or ignoble thought process. Proponents of strict liability, especially in its modified presumed fault form, argue that this inability to detect cheating is tolerable with human only sports. This on the basis that the human athlete is autonomous and ultimately responsible for what enters their body. Many of the points in this research could be used in an assault on that

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<sup>762</sup> [2006] EWHC 986 (QB).

wider argument too, but human-only sports are outside the scope of this work. What is proven by this thesis is that the application of these arguments to equine-based sport is a ‘bridge too far’ and simply does not stand up to careful scrutiny. The *mind* that suffers the sanction is in a separate *body* to that which is the site of the transgression. This *body* belongs to a member of a different species, one that is now, even by CAS, constructed as an athlete<sup>763</sup>. It is simply not credible to argue that the same provisions, with minor modifications should apply to both members of the team in this context. The situation is not the same as a human-only team, such as in a relay race where all members would face disqualification based on the adverse finding in one. Nevertheless, when considering the *status quo* in equine sport integrity regulation, there is no allowance for insufficient autonomy on the part of the horse, nor in practical terms that it is not possible for a human athlete to *always* exercise sufficient control over what the horse ingests.

The first point of contention is strict liability itself. Of all the arguments used to justify it, the alleged near impossibility of bringing certain cases without it looms largest. It is argued that the difficulty of pursuing certain criminal charges, particularly of a minor, regulatory non-stigmatic nature, outweighs the ‘collateral damage’ of the odd unjust prosecution. But this paradigm is part of a systemic view which prioritises the convenience of the ‘ruling class’ over everything else. Further, taking a Gramscian lens to sport, this also true of sport’s governing elites. Sports regulation is a microcosm of human society, in a professional sport there are the ‘ruled’ and the ‘rulers’. There may be a semblance of democracy, there is an electorate and elections for powerful positions from FIFA to the USGA, Formula One Racing to the FEI and so on. What that tends to create, however, is a body of mostly men and some women skilled at retaining those powerful positions, just as it does in nation states. Gramsci well understood the ability of the rulers to shift and change, give and gain ground, but ultimately not relinquish power<sup>764</sup>. Gramsci was writing about presidents and governments, monarchs and their courts. At the time there was little in the way of what Walker notes as being social orders which supercede the legislative efforts and even the treaty making of nation state actors such as politicians<sup>765</sup>. Corporate codes of

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<sup>763</sup> See CAS 2012/A/2807 *Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale*/CAS 2012/A/2808 *Abdullah Waleed Sharbatly v. Fédération Equestre Internationale* at para 6.24.

<sup>764</sup> Gramsci and Forgacs (n 294) 218.

<sup>765</sup> See Walker (n 16) 373-396.



governance are one such example, the WADA Code is another, so it is now possible for despotic tendencies to be glimpsed in these supra-national orders just as Gramsci saw them in governments.

In sport, it is true that persons make themselves subject to these international social orders by an act of will because they want to compete at the elite level, but that ostensibly free will is fettered. There is no choice in accepting the detail of the rules, to not do so would be to be denied access to competition at that level. The ‘take it or leave it’ contractual approach is unduly harsh therefore. This would also mean being denied a living from the pursuit that the sportsperson does best, i.e. their sport. This lack of choice is highlighted by the *Pechstein Case*<sup>766</sup>. Although the litigation has ultimately gone against Claudia Pechstein, this could have caused shuddering ramifications for CAS, had it gone the other way<sup>767</sup>. Nevertheless the ‘ruling class’ of any sport is quite capable of perpetuating mechanisms which make it easier to ‘prosecute’ under its rules. This is part of maintaining power, not just a practical measure, however often it may be presented as pragmatic.

Under current arrangements, when we are presented with an athlete who has received a disqualification and/or a ban it is impossible to know whether the ‘fight to clean up sport’ is succeeding or not, notwithstanding that these cases are presented as such by the sport’s rulers. This is because, if current detection statistics are ‘pathetic’, and only ‘dopey dopers’<sup>768</sup> are getting caught, then is little wonder that the public perception is that only the ‘unlucky or pharmaceutically unsophisticated’<sup>769</sup> are being brought before tribunals. This, by implication, means equine sports tribunals too. Faith in the entire system of equine anti-doping and other integrity regulation is clearly a possible casualty if nothing is done. The ‘party line’ is that ‘we cannot...move one millimetre from strict liability...’ The irony is that as was shown in Chapter 6, there are entire jurisdictions, belonging to modern, democratic, nation states which on principle will not go within a kilometre of it. They prefer instead to deal with these matters by administrative sanctions, outside the criminal law.

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<sup>766</sup> CAS 2009/A/1912 and Landgericht München, judgment dated February 26, 2014, file no. 37 O 28331/12.

<sup>767</sup> Duval and Rompuy (n 285).

<sup>768</sup> Anderson (n 137) 141.

<sup>769</sup> Connor and Mazanov (n 728) 871-72 cited in Anderson (n 137) 141.

#### 8.1.4 What to do about strict liability?

This research has considered alternatives to a radical change for horse sport regulation. The arguments for moving to a public health approach and away from prohibition are attractive if one is concerned about justice, not just convenience of prosecution. In sports generally, the cost of prohibition is staggering, with more than £300million estimated to be spent annually on detection by WADA. The move to a ‘public health’ approach is advocated by such as Suvaescu, Rolles, and Anderson, but there would still be a need to pursue determined transgressors even under a regime where PEDs are managed and regulated. That said, a good proportion of this money could be saved, or at least diverted, into monitoring and advising sports participants. There is a definite and consistent drift in the message that successive administrations in the UK have put out regarding young people and street drugs. This travel provides a useful comparator and the movement is from the rhetoric of ‘just say no’ to ‘talk to Frank’<sup>770</sup> as key ‘strap lines’. This evolution of terminology implicitly acknowledges that prohibition has failed, just as formal prohibition under the *Volstead Act* did in the United States in terms of alcohol.

There is however a major caveat in relation to equine sports. Horse-based sport is entirely different from human-only sport. Specifically, as consistently argued here, the controlling *mind* belongs to a different *body* to that subject to any dosage of medication. The ‘death in the locker room’ argument<sup>771</sup> has been discussed earlier in relation to strict liability as a concept in sport. There is a danger that human athletes would be even less concerned if they were only risking the life of a horse.

The mechanisms are already in place to hear equestrian cases with fault-based liability in place. Arguments over level of fault are already heard under the FEI’s EADCMRs for instance, in relation to the severity of the sanction. If no fault or negligence or no significant fault or negligence are proven, then the sanction may be mitigated such as happened in the *Sharbatly* and *Al Eid* cases studied at length. It is a matter of drafting to link those arguments to guilt or innocence rather than level of sanction. If the fault of the party can be considered to mitigate (or

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<sup>770</sup> Brian Wheeler, ‘Talk to Frank: Do anti-drugs adverts work?’ (7 February 2013) BBC News Magazine available online at: <http://www.bbc.co.uk/news/magazine-21242664> (accessed on 02/11/15).

<sup>771</sup> Goldman and Klatz (n 478) and Goldman and Klatz (n 137).

otherwise) the sanction, why can it not be so considered in arriving at a finding? At the moment, the situation is akin to a criminal justice system where all persons found in possession of another's property are convicted of theft, but there is allowance for their moral fault in the sentencing phase. There is no logic in refraining from changing to fault-based liability, but plenty of policy, mostly aimed at the convenience of the 'prosecuting authority'.

These policies ought to be challengeable by a sportsperson 'revolution', but activist athletes are hard to find given the 'coercion and consent' that the current system has embedded in it. Change is left to be debated by successive panels of reviewers in varying equine sports. These have not produced much other than a tightening of rules already in place. There is one notable exception however, the Neville Review 2008. Otherwise however, persons who would have the ability to influence radical change in the regulation of equine sport, consistently fail to do so. This was never surprising given that this research has proven the panel members in these reviews are drawn without exception from the rulers. Particularly in equine sport – because of its historical association with monarchies, aristocracies and wealth – this can be both in a literal sense as well as meaning the metaphorical 'rulers' of sport.

Taking a pragmatic line, for the foreseeable future it may be all but impossible to argue for a move to fault-based liability as too radical. The options for mitigating the harshness of the strict liability rule without moving away from it completely are few. If, however more than half of the strict liability offences in English law have a 'due diligence' defence<sup>772</sup> then there is a logic in exploring that as a way forward in sport. There is a precedent which could serve as a model, the version in the Bribery Act 2010. The Bribery Act defence relies on a set of 'principles' in the Act which are not intended to be an exhaustive list of what is or is not 'due diligence'. This chimes with the ethos of the solution ultimately proposed in this conclusion – re-writing all regulations to be interpreted purposively. A 'due diligence' defence enshrined in such as the FEI's regulations would not attempt to prescribe acts or omissions in a *literal* fashion. Rather it would explain how the team, or an individual rider, might be judged to be duly diligent notwithstanding a positive sample from the horse. A set of principles, rather than the literal interpretation of detailed and complex provisions would allow exculpation for persons that have not consciously

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<sup>772</sup> Ashworth and Blake (n 388) 306.

cheated nor bear any moral fault. This is an attractive option and worthy of further research perhaps. but ultimately a fundamental overhaul is considered necessary to address the ‘rulers’ consistent campaign of ‘coercion and consent’, designed as it is to persuade acceptance of an elderly and failing *weltanschauung*<sup>773</sup>.

## 8.2 The new paradigm required

The previous discussions involve tinkering rather than re-engineering. What is needed is revolution and re-invention. This is not from any academic whimsy, the basis was laid out by Dame Neville in her review of the BHA in 2008<sup>774</sup>. At Para 1.24 Dame Neville makes quite a departure from mainstream thinking in her conclusions and it is worth repeating in full here:

‘...ideally, rules should be based on a set of underpinning principles. The rules themselves should not be too detailed in order to allow them to be applied more flexibly. The recommended model would be to have a set of principles supported by codes of conduct with rules which sit under them. A breach of a principle or a code of conduct can lead to a liability to disciplinary sanction, even if there is no specific rule. This gives flexibility and means that it is not necessary to try to cater for every eventuality in the rules’<sup>775</sup>.

This presents, ‘front and centre’, the ability to address the question so commonly absent from consideration by the regulations and processes as they now are; ‘*did the athlete, owner or trainer cheat or intend to cheat?*’ Dame Neville emphasises that action can be taken even if no specific rule is broken. Thus, if the rider or yard is exonerated under ‘Neville’ style rules, then consideration can be given to who else, if anyone, deserves punishment. The detail of the principles should provide that a disqualification of the rider and horse would follow in any event though, provided there was more than a *de minimis* effect on performance or welfare.

There are clear precedents for this, the SRA’s professional regulation system and the ‘due diligence’ principles in the Bribery Act 2010. This then, is the way forward to reduce the

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<sup>773</sup> Gramsci (n 18) 382.

<sup>774</sup> BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 30/07/15)

<sup>775</sup> *Ibid.* para. 1.24.

occurrence of integrity crises in equine sport. Rules re-written in this way would require a new paradigm of interpretation however as well. The WADA Code and derivatives of it require literal interpretation which owes much to the preferences of the common-law tradition. A purposive approach, such as has long operated in civil legal systems, would need to be paramount in applying the new principle-based rules. This should not prove a problem for lawyers trained in Roman-Germanic law derived jurisdictions. Further, it would be surprising if common lawyers could not easily adapt given that the mischief rule has such a long history. The continental purposive interpretation of statute has much in common with the mischief rule. In both methods, the overall purpose of the statutory provision is considered paramount over the literal meaning of the words. The importance of EU legislation to the UK has grown exponentially since 1973, much of this primary legislation is written in the continental legal style with broad principles rather than specific detailed provisions. Consequent on all this, although it has not eclipsed the literal rule, the purposive approach is now of greater importance than it once was and is routinely taught in UK law schools to undergraduates. This is all potentially thrown into question by ‘Brexit’ of course. However, on the assumption that a full review of the content of all UK law will take a generation to achieve, the purposive approach is still relevant for this thesis. Finally, given that the seat of both the FEI and CAS is in a country with a civil legal tradition, it is perhaps surprising that sporting regulation based on the literal approach and common law mechanisms was so readily accepted in the first place.

Dame Neville’s suggestion was made solely in respect of the BHA’s extremely complex Rules of Racing. However, this research has shown that, pared back to the bare essentials, horse racing and equestrianism (and indeed all equine-based sport) share more in common than they have differences. Thus, there is a clear argument for *all* equine sporting regulation to be re-written in this way. Dame Neville’s suggestion, implemented first by the BHA, could serve as an exemplar for Olympic equestrianism and other equine sports to follow. This would be a just and equitable development and that is a worthy end in itself. However, from a practical point of view, new regulation structures and procedures would also be less vulnerable to litigation on procedural grounds than the current ones. This research has proven that the current rules potentially transgress human rights. Furthermore, since *Bradley v Jockey Club* the courts appear to have accepted a supervisory jurisdiction over sport whether or not a contract exists. Such a

supervisory jurisdiction would have to be exercised with ECtHR jurisprudence in mind because the court is an organ of the state. Further, based on Oliver's research, a private law claim for a breach of contract should be decided with convention principles and/or those underpinning judicial review proceedings to the fore<sup>776</sup>. Oliver's findings have also been borne out by the decision in *Bank Mellat v HM Treasury (No 2)* already. Consequently, it is over simplifying matters to argue that proceedings before a sports disciplinary tribunal are non-criminal and that therefore Article 6 ECHR does not apply. The principles therein are now an implicit requirement of any contractual relationship and thus should be read into a contract between a sports participant and an SGB or ISF. It is therefore evident that all Article 6 case law is now potentially relevant and current equine sport regulation is potentially vulnerable to challenge on these grounds

### 8.2.1 'One ring to rule them all'?

There is a clear and present need for Dame Neville's principle-based re-write to urgently be implemented as a way to prevent recurrent integrity crises. The next question however, is how does this research point the way for that to be implemented across all the major horse sports? The *status quo* is problematic, not just because of the presumed fault issue, but also because of the *interface problem*, specifically that the worlds of FEI-governed sport, that of flat and jump racing and all other equines sports for that matter, are not as distinct as the respective governing bodies are keen to insist. It is proposed here that the specific problems in equine sports warrant a new sub-genre of sports law, *equinae lex sportiva* – equine sports law.

There are a considerable number of aspects in various equine sports where the distinction between different sports is arbitrary and owes more to territoriality than logic. The problem is most clearly illustrated however by the degree to which the same personnel can be involved with both FEI endurance racing and BHA-governed flat racing. This is a problem which the FEI must be alive to as the EADCMRs now include a provision precluding association with persons who '...would have [been in] violation of anti-doping rules if Code-compliant rules had been

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<sup>776</sup> Oliver (n 8).

applicable to such Person’<sup>777</sup>. By contrast, the BHA is only concerned with preventing association with those that *it* has disqualified or excluded, albeit there is a very wide discretion to exclude under Rule 64. Rule 69.1 does provide some reciprocity, but only with regard to a recognised foreign *racing* authority’s disqualification proceedings. The net result is that the BHA could not necessarily prevent a person ineligible under FEI rules from operating with race horses. Conversely, if the FEI were seeking to ban someone previously ‘convicted’ by the BHA then there must be severe doubt as to whether the provision would be effective. It would be impossible to say whether a person found liable ‘on the balance of probabilities’ would have been found liable to the ‘comfortable satisfaction’ of a tribunal panel without re-trying the entire matter. This is because comfortable satisfaction is, *de facto*, ‘beyond reasonable doubt’ based on *Re Doherty* and *Re B (Children)(FC)*. Beyond this, there is the problem that there is no international standard for horse racing, only a federation trying to encourage consistency. This means there is demonstrably no international consistency in discipline regimes, even in the single sport of horse racing.

The notion that ‘[t]he organisation and management of sport is fragmented...’<sup>778</sup> is particularly evident in equine sports. The IHSC forged by the IFHRA and FEI is a step in the right direction but is little more than a ‘talking shop’ unfortunately. The question is, are the reasons for this fragmentation, among the eighty or so equine sports worldwide, obstacles for the radical change just presented? A Gramscian approach is particularly useful in analysing that question. The SGB and IFs that already exist consist of ‘rulers’ and ‘ruled’. According to Gramsci’s analysis, the power dynamics in the relationship between the two ‘classes’ in sport replicate those in wider capitalist society. The resources, information dissemination platforms, and therefore the ability to maintain the hegemony, are all in the hands of sport’s rulers. The historical association between horses, wealth and social position is another key reason for studying the changing social construction of the horse in this equine sport-focussed research. What this study proves is that the net result of this historical association is members of the ruling class in equine sport tend overwhelmingly to be drawn from the same echelons as in wider society. Not for nothing is racing termed ‘the sport of kings’ for instance. A Gramscian analysis is particularly resonant for

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<sup>777</sup> EADCMRs, Effective 1<sup>st</sup> January 2015, Art. 2.9.2.

<sup>778</sup> DCMS (2000) *A Sporting Future For All*, London: DCMS, 6.

these sports therefore as this hegemony is reinforced through the ‘coercion’ effect of the draconian presumed fault rules. Further, the ‘consent’ to a ‘conception of the world which belongs to the rulers’ is manufactured by the repeated presentation of that *weltanschauung* as if it is the only acceptable one. With that in mind, ascertaining the true status of those sporting rules is of the utmost importance and not just an academic ‘frolic’ to determine how that coercive effect works.

The term *lex sportiva* has been coined, but it is a contested concept and the views of Gardiner, Davis, Lewis, and Taylor and James were considered. It is accepted that a distinct EU sports law does exist. However, the ultimate conclusion arrived at is that *for this research* the term *lex sportiva* is safest if limited to the emanations of CAS on equine sport and similar internal disciplinary panels of equine SGBs. To this can be added litigation that arises from those decisions, both domestic and EU. According to Reisner, all law is subjective and ‘only materialises in real terms to the extent that people make it the principle governing their behaviour’<sup>779</sup>. Thus, in the end, it is immaterial whether one is considering the aspects of *lex sportiva* that are ‘hard’ or ‘soft’ considering Abbott and Snidal’s continuum. This is because, although the majority of its components are ‘hard’ in nature, the main point is that it serves, very effectively, to enforce obedience by the ruled.

What is clear is that there is a complete lack of a coherent ‘legal system’ across even the realms of horse racing, never mind the sector which includes the Olympic sports. This is another key aspect of the *interface problem*. The disparate sets of regulations and judicial functions help to maintain the small clique of powerful people in those separate sports in that influential and prestigious position. Any amalgamation would, of necessity, mean a smaller ruling cadre for the new larger body. This is a major problem when considering the ideal of all horse sport being subject to regulations and procedures based on Dame Neville’s principle-based suggestion.

Dame Neville also criticised the Orders and Rules of Racing themselves as overly complicated. The very large sets of documents are lacking in clarity and cover matters entirely outside that

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<sup>779</sup> Reisner (n 593) 35.



which, in her opinion, they should, such as employment conditions<sup>780</sup>. As Chapter 6 proves, the FEI's EADCMRs are similarly cumbersome, complex, and hard to use. Under the current governance *status quo* there is no obvious way that Dame Neville's ideas would directly influence an amendment of the EADCMRs however. This is because the FEI would simply assert that Olympic equestrianism and racing have little in common.

One model might be an international governing body which governs all equine sports. The IHSC would be a useful place to start discussions on this. FIFA has global governance over all games that conform to the internationally-recognised format of football (soccer). A global equine ISF could aspire to the same reach with the only stipulation being that the competition involves teams of athletes of both the human and non-human variety. Howman has called for a world sports integrity agency modelled on WADA with 'doping, betting, bribery, and corruption'<sup>781</sup> as its remit. This more holistic approach could be adopted, to take into account the increased threat of gambling-based corruption identified in this research. In doing so, the new global equine sports body could have rules written following Dame Neville's model.

FIFA is not a paragon of an incorruptible sporting institution, however. It would be undesirable if the implementation of this research lead to the leading cadres in the current equine sports morphing into one super equine sport 'bourgeoisie'. However, the prevailing power dynamic would be harder to maintain. The purposive interpretation of *principles* has the capability of winning trust among participants, and not just ruling by fear. This reduces the coercive effect of the rules and thus lessens the grip of the 'rulers'. There is no doubt that the lack of any real reciprocity across horse racing jurisdictions identified by this research means a threat to that sport's integrity. However, persuading even all the racing jurisdictions to amalgamate is as problematic as persuading them all to operate under one global governing body. A better way forward is thus likely to be a federated approach. The negotiations would be difficult and lengthy but, ultimately, if sufficient numbers were persuaded to federate and operate the Dame Neville based rules then there might be sufficient gravity to attract the rest. In other words, the new

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<sup>780</sup> BHA Press releases BHA Press Releases available at: <http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf> (accessed on 29/07/15), para. 1.23.

<sup>781</sup> Howman (n 352) 247.

group might become a ‘strange attractor’ to coin Engle’s phrase<sup>782</sup>. Again, the IHSC provides a vehicle for the initial work on this if the ‘spirit is willing’.

The design of any convention ultimately required however must be more ambitious than the IFHRA’s *International Agreement on Breeding, Racing and Wagering*. This allows derogation from key aspects too easily. The consequences of this can be seen in the *Hughes and Dwyer* BHA Appeal Board cases. This must be no ‘talking shop’ and certain consistencies, such as the Dame Neville rules would be a central pillar. The less draconian nature of these rules would be less likely to reinforce an undesirable hegemony, and thus still reduce the grip of the equine sport ‘rulers’ in each of the eighty or so fiefdoms.

### **8.3 Final thoughts**

The research question is ‘*can changes based on a Gramscian critique of the governance of equine sports substantially reduce the occurrence of crises in integrity for human participants?*’ The answer is yes, as explained particularly in Chapters 6 and 7, a new paradigm for drafting regulations and procedures for equine sport is both necessary and desirable. The template of this has been presented by this research. These rules and procedures would be anti-corruption rather than simply anti-doping in remit. This concurs with Howman’s ideas for all sport discussed in Chapter 5.

The *interface problem* was first addressed substantively in Chapter 5; this is a major obstacle for the effective management of integrity across equine sport as a whole. In practical terms, this problem would also severely limit the application of the new rules across all equine sports worldwide. There is also the political problem of creating a worldwide sports body for equine sport without simply metamorphosing and reinforcing the ‘rulers’ into a larger more powerful organisation, one that was still replete with all the unequal power dynamics Gramsci was so critical of. The best solution is for a properly formulated global federation of equestrian sports to be set up. This is without the limitations of the IFHRA, but with a broader scope than just horse racing.

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<sup>782</sup> Engle (n 734) and Teubner (n 750).

Above all, this thesis has shown that to leave things as they are would be highly problematic in any practical analysis as well as unconscionable on an ethical level. After all, it is as true to say in a sporting context as it is in any other... ‘injustice anywhere is a threat to justice everywhere’<sup>783</sup>.

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<sup>783</sup> Martin Luther King (1929-1968), Letter from Birmingham Jail, April 16, 1963.

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**CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale**  
**CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale**

**ARBITRAL AWARD**

**delivered by**

**THE COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

Sole Arbitrator: Mr Graeme Mew, Barrister in Toronto, Canada and London, United Kingdom

in the arbitration between

**KHALED ABDULLAZIZ AL EID & ABDULLAH WALEED SHARBATLY**

Represented by Mr Jeremy Dickerson, Mr James Pheasant and Miss Georgina Shaw of Burges Salmon, Bristol, United Kingdom

- Appellants -

**and**

**FEDERATION EQUESTRE INTERNATIONALE**, Lausanne, Switzerland

Represented by Mr Jonathan Taylor and Ms Anna-Marie Blakeley of Bird & Bird LLP in London, United Kingdom and Ms Lisa Lazarus, FEI General Counsel

- Respondent -

## 1. INTRODUCTION

- 1.1 The two cases which form the subject of this appeal award engage consideration of the *Equine Controlled Medication Rules* (“ECM Rules”) of the Fédération Equestre Internationale (“FEI”)
- 1.2 At the outset is important to record that neither case involves anti-doping rule violations. The *ECM Rules* exist ‘to ensure horse welfare and the highest levels of professionalism’, by ensuring that medications (“Controlled Medication Substances”) and methods (“Controlled Medication Methods”) that are commonly (and appropriately) used to treat horses when they are not competing, are not used inappropriately in relation to horses that are in competition.
- 1.3 While doping and inappropriate use of medication are certainly related, and in some respects the way they are regulated is similar, the nature, scope and purposes of the *ECM Rules* are very different from the nature, scope and purposes of the anti-doping rules.
- 1.4 The Appellants are equestrian athletes. They were not accused of doping but, instead, were charged because of the presence of the medications, Phenylbutazone and Oxyphenbutazone (commonly known collectively, as “Bute”), in their competition horses’ systems without the required pre-authorisation.
- 1.5 Phenylbutazone is a non-steroidal anti-inflammatory and pain-relieving drug that is primarily used for musculoskeletal conditions; Oxyphenbutazone (a metabolite of Phenylbutazone) is also a non-steroidal anti-inflammatory and pain-relieving drug. Both substances are classified as *Controlled Medication Substances* in the *Equine Prohibited Substances List*.
- 1.6 To put things in context, in the course of submissions, counsel for the Appellants described Bute as “ibuprofen for horses”.
- 1.7 In many cases involving adverse analytical findings for controlled medication substances, such as Bute, a “Person Responsible” (which would include an Athlete who rides a Horse during an Event – see Appendix 1 – Definitions of the ECM Rules) can elect to have his or her case processed under the “Administrative Procedure” set out in Article 8.3 of the ECM Rules. Where this procedure applies, the following sanctions would apply:
  - a. *Disqualification of the Person Responsible and/or member of the Support Personnel (where applicable) and the Horse from the whole Event and forfeiture of all prizes and prize money won at the Event;*
  - b. *A Fine of CHF 1,500; and*

*c. Costs of CHF 1,000. However, if a B Sample analysis is requested and the administrative Sanction accepted after the B Sample Analysis, the costs shall be increased to CHF 2,000.*

- 1.8 The Appellants were, for reasons explained more fully below, unable to elect to have the Administrative Procedure applied to their cases. Instead, the charges against the Appellants were heard by the FEI Tribunal (oral hearing on 18 and 19 April 2012; decision dated 23 May 2012).
- 1.9 The tribunal imposed a sanction of Ineligibility of eight months on each of the Appellants.
- 1.10 Due to the impending 2012 Olympic Games in which, but for the sanction imposed by the FEI Tribunal, both of the Appellants had hoped to participate as representatives of the Kingdom of Saudi Arabia, the parties agreed to an expedited appeal from the decisions of the FEI Tribunal.
- 1.11 This Panel's decision was announced on 11 June 2012 with reasons to follow.
- 1.12 For the reasons set out below, this CAS Panel concludes that the FEI Tribunal conflated the sanctioning principles set out in the *Equine Anti-Doping Rules* with those applicable under the *ECM Rules*, with the result that an excessive sanction was applied having regard to all of the circumstances of each case.
- 1.13 The sanction of 8 months Ineligibility imposed on each of the Appellants by the FEI Tribunal should therefore be set aside and replaced with a sanction of 2 months Ineligibility for each of the Appellants.

## **2. THE PARTIES**

- 2.1 The Appellant Khaled Abdulaziz Al Eid ("Al Eid") is a competitor in the equestrian sport of jumping. He is a member of the Saudi Equestrian Team. He won a bronze medal at the 2000 Olympic Games in Sydney, an individual gold medal in the 2006 Asian Games in Doha and an individual bronze medal in the 2010 Asian Games in Guangzhou.
- 2.2 The Appellant Abdullah Waleed Sharbatly ("Sharbatly") is also a competitor in the equestrian sport of jumping. He is a member of the Saudi Equestrian Team. Sharbatly won an individual silver medal at the 2010 World Equestrian Games in Kentucky.
- 2.3 The FEI is the international governing body for equestrian sport. Its responsibilities include making and enforcing regulations that protect the integrity of the sport.



- 2.4 Al Eid and Sharbatly are each subject to the disciplinary jurisdiction of the FEI.

### 3. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

- 3.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

#### Al-Eid v FEI

- 3.2 Al Eid rode VANHOEVE in the CSI 3\* Event in Riyadh, Saudi Arabia between 30 November 2011 and 3 December 2012 (the 'Riyadh Event'). The horses competing in the Riyadh Event, including VANHOEVE, were stabled at the International Riding School, which was located next door to the showground for the Riyadh Event. Al Eid was placed in two competitions on VANHOEVE at the Riyadh Event on 3 December 2011.
- 3.3 At 5:00 p.m. on 3 December 2011, a blood Sample was taken from VANHOEVE for testing under the *FEI Equine Anti-Doping and Controlled Medication Regulations* ("EADCMR") and Veterinary Regulations. The EADCMR contains both the *Equine Anti-Doping Rules* and the *ECM Rules*. The Sample was divided into an A Sample and a B Sample in accordance with the EADCMR, and sent to the FEI approved Hong Kong Jockey Club Racing Laboratory (the "Hong Kong Laboratory") for analysis.
- 3.4 The Hong Kong Laboratory analyzed the A Sample of VANHOEVE's blood and found Phenylbutazone and Oxyphenbutazone to be present.
- 3.5 Both Phenylbutazone and Oxyphenbutazone are classified Controlled Medication Substances under the *Equine Prohibited Substances List*.
- 3.6 By a letter dated 2 February 2012, the FEI charged Al Eid with a violation of Article 2.1 of the *ECM Rules*, pursuant to which "[t]he presence of a Controlled Medication Substance or its Metabolites or Markers in a Horse's sample" constitutes an ECM Rule violation. Article 2.1.1. of the *ECM Rules* states that "[i]t is each Person Responsible's personal duty to ensure that no Controlled Medication Substance is present in the Horse's body. Persons Responsible are responsible for any Controlled Medication Substance found to be present in their Horse's Samples..."

- 3.7 No request had been made for the use of Phenylbutazone and Oxyphenbutazone on the Horse, and no Equine Therapeutic Use Exemption (“ETUE”) or medication form had been presented for the substances at the Riyadh Event.
- 3.8 On 22 February 2012, the B Sample was analysed at the FEI-approved HFL Sport Science Laboratory in England. The HFL Laboratory confirmed the analytical findings made by the Hong Kong Laboratory with respect to the A Sample.
- 3.9 By letter of 24 February 2012, Al Eid accepted a period of voluntary Provisional Suspension, effective as of 24 February 2012.
- 3.10 Al Eid does not challenge the results of the analysis of the Sample and accepts that the substances are Controlled Medication Substances for the purposes of the *ECM Rules*.
- 3.11 Before the FEI Tribunal and this Panel, however, Al Eid contended that Bute was found in VANHOEVE’S Sample as a result of “inadvertent ingestion of powdered bute that was present at the [International Riding School] stables, and most probably in VANHOEVE’s stable, because the stable and wall-mounted feed bucket had not been cleared prior to VANHOEVE’s arrival and nor had the stable yard as a whole”.
- 3.12 Al Eid denies any deliberately knowing administration of Bute to VANHOEVE. VANHOEVE’s medical records, corroborated by Dr. Philippe Benoit, the Saudi Equestrian team veterinarian, confirm that VANHOEVE was not prescribed with Bute (or any medication containing Bute) in the run up to the Riyadh Event.
- 3.13 The evidence of Al Eid and other individuals charged with the care of VANHOEVE and his preparation for the Riyadh Event, is that care was taken to prevent VANHOEVE from inadvertently coming into contact with prohibited substances prior to the Riyadh Event.
- 3.14 Al Eid expressed the belief that VANHOEVE must have come into contact with Bute while stabled at the International Riding School for the following reasons:
  - (a) Due to exceptional weather conditions including unprecedented rainfall and flooding, Al Eid found that the stables at the International Riding School had not been cleaned out before the horses competing at the Riyadh Event, including VANHOEVE, had to be put into them. It was not possible to properly clean VANHOEVE’s stable until after the vet check had taken place;
  - (b) When VANHOEVE was put into his stable, he nosed around in the old bedding and in the dirty wall-mounted feed bucket before the groom was able to clean the stable;
  - (c) Dr. Mahrous Abdelkarim, one of the vets who treated the horses at the International Riding School, confirmed that Bute, in its powdered form, is

regularly used by him and the other vets at the International Riding School, to treat the horses. They use Bute because it is cheap, reliable, and easy to administer in powder form into the food of the horses;

- (d) Dr. Mark Dunnett, an expert witness retained by Al Eid, confirmed in his report that contamination of the stable environment in which VANHOEVE was kept at the International Riding School would be a plausible explanation for the levels of P and O detected in the blood sample taken at the Riyadh Event.

3.15 Under the *ECM Rules*, in the cases of Controlled Medication Substances, Al Eid would have been able to elect Administrative Procedure (also referred to as “Fast Track”), provided that the pre-requisites of Article 8.3.1 of the *ECM Rules* had been fulfilled. Al Eid would qualify for the Administrative Procedure if there had been no Controlled Medication violation by him in the previous eight years. However, Al Eid committed a first Controlled Medication rule violation in January 2005, and could therefore not be considered a first time offender within the meaning of Article 8.3.1 (b) of the *ECM Rules*. Notwithstanding that, the current violation is only considered a first violation for sanctioning purposes under the *ECM Rules*, because to be considered a multiple violation, triggering increased sanctions, the previous violation would have to have occurred within four years of the current violation.

#### Sharbatly v FEI

- 3.16 Sharbatly rode LOBSTER in the CSI 3\* Event held in Al Ain, UAE, from 9 – 11 February 2012 (the “Al Ain Event”). As a result of his and LOBSTER’S performance in the Grand Prix Qualifier Competition on 10 February 2012 at the Al Ain Event, they won that Competition.
- 3.17 Sharbatly further competed with LOBSTER on 9 February 2012 in the Two Phases Competition, and on 11 February 2012 in the Al Ain Grand Prix.
- 3.18 At 10:05 p.m. on 10 February 2012, a blood Sample was taken from LOBSTER for testing under the EADCMR and *FEI Veterinary Regulations*. The Sample was divided into an A Sample and a B Sample in accordance with the EADCMR, and sent to the HFL Laboratory for analysis.
- 3.19 The HFL Laboratory analysed the A Sample of LOBSTER’S blood and found Phenylbutazone and Oxyphenbutazone to be present.
- 3.20 By letter dated 24 February 2012, the FEI charged Sharbatly with a violation of Article 2.1 of the *ECM Rules* (see paragraph 3.6 above for the pertinent provisions of that rule).

- 3.21 No request had been made for the use of Phenylbutazone and/or Oxyphenbutazone on the Horse, and no ETUE or medication form had been presented for the substances at the Al Ain Event.
- 3.22 By letter dated 28 February 2012, Sharbatly accepted a period of voluntary Provisional Suspension, effective as of that date.
- 3.23 On 6 March 2012, the B Sample was analysed at the HFL Laboratory and was attended by Neville Dunnett on Sharbatly's behalf. The HFL Laboratory confirmed the analytical findings that had been made by it with respect to the A Sample.
- 3.24 At the time of the hearing before this CAS Panel, Sharbatly had not competed since the Al Ain Event.
- 3.25 Sharbatly does not challenge the results of the analysis of the Sample and accepts that the substances are Controlled Medication Substances for the purposes of the ECM Rules. Accordingly, Sharbatly accepts the Adverse Analytical Findings of the HFL Laboratory, namely that Phenylbutazone and Oxyphenbutazone were present in the blood Sample collected from LOBSTER at the Al Ain Event on 10 February 2012.
- 3.26 Sharbatly further accepts that, for the purposes of Article 10.4.1 of the ECM Rules, he cannot establish how the substances entered into LOBSTER'S system.
- 3.27 Sharbatly nevertheless asserts that the substances were not, to his knowledge, administered to LOBSTER in the lead up to the Al Ain Event. Following extensive inquiries, the only possible explanation Sharbatly is able to offer for the presence of the substances are contamination or sabotage (although he acknowledges that sabotage is unlikely) and that both he and the Saudi Equestrian team exercised utmost caution in relation to compliance with the EADCMR and ensuring that LOBSTER did not come into contact with any Prohibited Substances. This evidence was corroborated by witness statements from other personnel affiliated with the Saudi Equestrian team including Dr. Philippe Benoit the team veterinarian. Dr. Benoit asserted that the only possible explanation for the presence of the substances was contamination.
- 3.28 An expert report from Dr. Mark Dunnett concluded, on the basis of the evidence presented to him, that "[c]ontamination of the stable environment with residues of Phenylbutazone from the legitimate treatment of other horses prior to the event is a plausible explanation for the presence of the levels of Phenylbutazone and Oxyphenbutazone in the sample from Lobster".
- 3.29 Dr. Dunnett noted that the estimated level of Phenylbutazone in the A Sample from LOBSTER was only 12ng/ml (or 12%) above the FEI Reporting Level of 100ng/ml. Dr. Dunnett added that "Given that the value reported is only an estimate which will have an inherent uncertainty it is conceivable that the true value may be below the

reporting level.” In any event, according to Dr. Dunnett, the estimated concentrations of Phenylbutazone and Oxyphenbutazone in the A Sample was very low in comparison with the levels more commonly encountered in positive post-competition and post-race drug surveillance samples.

- 3.30 Other than the expert report of Dr. Dunnett, there was no evidence demonstrating that the environment at the Al Ain Equestrian Club was contaminated.
- 3.31 Under the ECM Rules, in the case of Controlled Medication Substances, Sharbatly would have been able to elect Administrative Procedure (also referred to as “Fast Track”), provided that the pre-requisites of Article 8.3.1 of the *ECM Rules* had been fulfilled. Sharbatly would have qualified for the Administrative Procedure if this had been his first Controlled Medication Violation in eight years. However, Sharbatly committed a first Controlled Medication Rule Violation in January 2006, and therefore could not be considered a first time offender within the meaning of Article 8.3.1(b) of the ECM Rules. Notwithstanding that, the current violation is only considered a first violation for sanctioning purposes under the ECM Rules, because to be considered a multiple violation, triggering increased sanctions, the second violation would have to have occurred within four years of a first violation.

Sanctions Under the *ECM Rules*

- 3.32 The applicable sanctioning regime is set out in Article 10 of the *ECM Rules*.
- 3.33 Article 10.2 provides, in relevant part, as follows:

*... the period of Ineligibility imposed for a violation of Article 2.1 (presence of a Controlled Medication Substance or its Metabolites or Markers) ... shall be:*

*First violation: Up to two (2) years of Ineligibility.*

*A Fine of up to CHF 15,000 and appropriate legal costs shall also be imposed for any Controlled Medication violation.*

*However, the Person Responsible ... shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating, reducing, or increasing, this Sanction as provided in Article 10.4.*

- 3.34 Article 10.4, relied upon by El Aid, provides for the elimination or reduction of a period of Ineligibility based on “Exceptional Circumstances”:

**10.4.1 No Fault or Negligence**

*If the Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Fault or Negligence for the ECM Rule violation, the otherwise applicable period of Ineligibility and other Sanctions may be eliminated in regard to such Person. When a Controlled Medication Substance or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 (presence of a Controlled Medication Substance), the Person Responsible and/or member of the Support Personnel (where applicable) must also establish how the Controlled Medication Substance entered the Horse's system in order to have the period of Ineligibility and other Sanctions eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable and other Sanctions are eliminated, the ECM Rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for Multiple Violations under Article 10.6 below.*

**10.4.2 No Significant Fault or Negligence**

*If a Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility and other Sanctions may be reduced in regard to such Person. When a Controlled Medication Substance or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 (presence of a Controlled Medication Substance or its Metabolites or Markers), the Person alleged to have committed the ECM Rule violation must also establish how the Controlled Medication Substance or its Metabolites or Markers entered the Horse's system in order to have the period of Ineligibility and other Sanctions reduced.*

FEI Tribunal Decisions

- 3.35 Oral hearings concerning the infringements alleged by the FEI to have been committed by the Appellants took place before the FEI Tribunal in Lausanne on 18 and 19 April 2012.
- 3.36 In separate decisions each released on 23 May 2012, the FEI Tribunal ruled, in respect of each of the Appellants, that:
- (e) The FEI had established an Adverse Analytical Finding for the presence of Phenylbutazone and Oxyphenbutazone in the Samples taken from their respective Horses during in-competition testing;
  - (f) Accordingly, an ECM Rule violation had been established;

- (g) While it was accepted that there had been no deliberate administration to the Horses concerned of Phenylbutazone and/or Oxyphenbutazone, the Appellants had not established on a balance of probabilities the source of the Phenylbutazone and Oxyphenbutazone found in the Samples taken from the Horses;
- (h) The Appellants and the Horses were disqualified from the Riyadh and Al Ain Events respectively, with all medals, points and prize money to be forfeited in accordance with Article 9 of the *ECM Rules* and that all other results obtained by the Appellants with the Horses at the Events would also be disqualified;
- (i) A period of suspension of eight months would be applied;
- (j) A fine of CHF 1,000 would be paid;
- (k) A contribution of CHF 3,000 towards the legal costs of the judicial procedure and the cost of the B-sample analysis would be made.

3.37 In the case of Al Eid, the Athlete had taken the position that any otherwise applicable sanction should be reduced or eliminated in accordance with Articles 10.4.1 or 10.4.2 of the *ECM Rules* on the basis that there was “No Fault or Negligence” or “No Significant Fault or Negligence” on his part for the positive findings.

3.38 The FEI Tribunal rejected this position. Noting that in order to benefit from any elimination or reduction of the applicable sanction under Article 10.4 of the *ECM Rules*, an Athlete must first establish, on a balance of probabilities, how the Prohibited Substance entered the Horse’s system, the FEI Tribunal concluded that El Aid had failed to do so.

3.39 Each of the Athletes was given the full benefit of the voluntary Provisional Suspensions which they had taken, with the result that Al Eid’s period of Ineligibility was ordered to have commenced on 24 February 2012 (the date that he elected a period of Voluntary Provisional Suspension) and to expire on 23 October 2012 at midnight and that Sharbatly’s period of Ineligibility was ordered to have commenced on 10 February 2012 (the date of Sample collection) and to expire on 9 October 2012 at midnight.

3.40 No issue is taken on appeal with the commencement dates selected by the FEI Tribunal.

3.41 In determining the applicable sanctions, the FEI Tribunal took into consideration as mitigating factors:

- (a) the fact that a professional team structure was in place with procedures for avoiding “anti-doing rule violations” [sic];
- (b) that the Appellants’ team employed a professional veterinary team which the Athletes had access to both during and outside business hours;

- (c) the prompt admission of the *ECM Rule* violation and the taking of Voluntary Provisional Suspensions.

3.42 The FEI Tribunal stated that it had taken into account that Al Eid's 2005 ECM Rule violation had also involved a Controlled Medication and that Sharbatly's 2006 violation had been a Doping offence.

3.43 The FEI Tribunal declined to take into account (for the purpose of sanctioning):

- (a) The low levels of Phenylbutazone and Oxyphenbutazone detected on the basis that neither is a "Threshold Substance" as a result of which any quantity of those substances is considered a positive and that in any event, the screening levels of the substances had been exceeded;
- (b) The upcoming London Olympic Games in which each of the Appellants hoped to compete and the alleged effect of the Appellants' suspensions on the Saudi Arabian team.

#### **4. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

4.1 On 24 May 2012, in accordance with Article 12 of the *ECM Rules* and Articles R47 and R48 of the *Code of Sports-related Arbitration* (the "Code") 2010 edition, the Appellants each filed appeals from the decisions of the FEI Tribunal.

4.2 Pursuant to Article R52 of the Code, the CAS, with the agreement of the parties, proceeded in an expedited manner.

4.3 On 29 May 2012, in accordance with Article R51 of the Code and the procedural timetable agreed by the parties, the Appellants filed their appeal briefs.

4.4 On 4 June 2012, in accordance with Article R55 of the Code and the procedural timetable agreed by the parties, the Respondent filed its answers.

#### **5. THE CONSTITUTION OF THE PANEL AND THE HEARING**

5.1 By letter dated 30 May 2012, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: Mr Graeme Mew (Sole Arbitrator). The parties did not raise any objection as to the constitution and composition of the Panel then or at the hearing.

5.2 On 5 June 2012, Orders of Procedure were made in respect of each of the appeals.

5.3 The Orders of Procedure scheduled a hearing on 7 June 2012 in London, United Kingdom.



5.4 On 7 June 2012, a hearing was duly heard at the offices of Bird & Bird LLP in London.

5.5 The following persons attended the hearing:

For the Appellants: Mr Jeremy Dickerson, Mr James Pheasant and Miss Georgina Shaw, counsel for the Appellants  
Mr Khaled Abdulaziz Al Eid and Mr Abdullah Waleed Sharbatly, the Appellants

For the Respondent: Mr Jonathan Taylor, Ms Anna-Marie Blakeley and Ms Lisa Lazarus, counsel for the Respondent

5.6 The Panel was assisted at the hearing by Ms. Louise Reilly, Counsel to the CAS.

5.7 At the hearing, the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

- **Sami Al Duhami**, Team Director, Saudi Equestrian Team, who lives in Riyadh, described the unusually adverse weather conditions which prevailed immediately prior to the Riyadh Event. There was very heavy rain causing schools to shut down for two days because of flooding. He verified photographs taken by his secretary which purportedly showed conditions in the stall used by VANHOEVE. He noted that the International Riding School was one of the older riding schools. Its standards of upkeep are not as high as one would find in Europe. 15 shows each year take place at the riding school, however only one of them is an “International” show.
- **Rogier Van Iersel**, Team Manager, Saudi Equestrian Team, who also described the weather in Riyadh at the time of the Riyadh Event. A combination of heavy rain and poor drainage led to flooding. The Riyadh event itself had to be delayed, initially for one, and then two days. The horses were put in the stables at the riding school. Dr Van Iersel also expressed the view that facilities at the International Riding School in Riyadh were not as good as those that would be found in Europe or the United States.
- **Mahros Abdelkarim**, treating veterinarian at the Riyadh International Riding School, who was present at the Riyadh Event. At the time of the Riyadh Event, Dr Abdelkarim went to the riding school to treat some horses under his care. Because of the heavy rain there was a lot of mess. There was also a lot of movement between stables. Dr Abdelkarim said that Bute is used a lot in Saudi Arabia. It is available over the counter. It is a common, inexpensive treatment. Dr Abdelkarim estimates that 70% to 80% of the horses stabled at the International Riding School would use Bute. It can be administered by either veterinarians or by grooms. It can either be injected or be administered in

powder form. At the International Riding School, the predominant application is by using powder. There are approximately 170 boxes at the International Riding School, approximately 140 of which are used by school horses and the other 30 or so by horses which are boarded at the school. 60 to 70 of the horses at the school are under the regular care of Dr Abdelkarim. He would also see some of the other horses from time to time. Although Dr Abdelkarim does not know which stall VANHOEVE was in, he does know the area. He could not say which horses had been in the stall before VANHOEVE and, specifically whether they were given Bute or not. He can say that there were horses in the area who were receiving Bute.

- **Khaled Abdullaziz Al Eid**, one of the Appellants, who, in addition to confirming his witness statement, described the conditions at the International Riding School when his horse arrived. The stable was not clean. Feed, buckets and hay were all present in the stall. The shavings on the stall of the floor were dirty. However, because fresh shavings could not be provided until the next day, not all of the shavings were removed as it would have been inappropriate to put the horse on bare concrete. Ordinarily Al Eid would have withdrawn from competition under such circumstances. However, he felt it important that he continue because it was an international show taking place in his country and having regard to the interest and support of sponsors and the King. Al Eid also spoke to his Olympic ambitions and the number of events that he had missed as a result of accepting a voluntary temporary suspension.
- **Abdullah Waleed Sharbatly**, one Appellant, described how before the Al Ain event, his horse, Lobster was coughing. Sharbatly had the horse checked by the event veterinarian. The reports he received referred to the medications used by the horse. Sharbatly said that if Bute had been given to the horse, then it would have been listed and an ETUE would have been requested. Ultimately, Sharbatly had no concerns about whether the horse should compete. Sharbatly said that he had been told at the time that he had Lobster checked by the event veterinarian, that Lobster would be tested. Accordingly, if Sharbatly had had any reason to believe that Lobster had Bute on board, he would not have entered him.

## **6. THE PARTIES' SUBMISSIONS**

### **A. Appellant's Submissions and Requests for Relief**

6.1 In summary, the Appellants submit the following in support of their appeals:

#### Al Eid

6.2 Al Eid argues that he has established, on the requisite balance of probabilities, that the explanation for the presences of the Controlled Medications in the Sample of

VANHOEVE is the ingestion of residual traces of the Controlled Medications through exposure to a contaminated stable environment at the Riyadh Event.

6.3 Having established the route of ingestion of the Bute found in VANHOEVE's sample, Al Eid bears No Fault or Negligence or, in the alternative, No Significant Fault or Negligence for the Presence of Controlled Medications in VANHOEVE's Sample.

6.4 The FEI Tribunal erred in finding that Al Eid had failed to establish, on a balance of probabilities, how the Controlled Medications entered VANHOEVE's system. Al Eid highlighted the following evidentiary points in support of this submission:

- (a) Bute was regularly used at the stables where the Riyadh Event took place.
- (b) Photographs of the stables at the time of the Riyadh Event reflect the poor state of cleanliness. The evidence of the witnesses was to similar effect.
- (c) The weather conditions which prevailed at the Riyadh Event were exceptionally bad. This contributed to the lack of cleanliness and controls in place to prevent the risk of contamination.
- (d) The movements of the horse explain how it came into contact with contaminated foraging and bedding.
- (e) The risk of contamination in the stable environment posed by the use of Bute and the plausibility of the explanation put forward by Al Eid.

6.5 Al Eid notes that in the FEI tribunal in the case of *Tackeray* (24 September 2009), the Athlete's groom provided a statement that she had either failed to wash the feed buckets properly or gave the wrong feed to the wrong horse, but she could not be absolutely certain. The Tribunal found that the evidence was sufficient to discharge the standard of proof by reference to its cumulative effect:

*"The Tribunal finds that the cumulative effect of all evidence in this case is sufficient for the PR to establish under the balance of probability that the first prerequisite of EADMCR Article 10.5.2 was met. The PR's groom testified that it is more likely than not that the feed buckets had been mixed."*

The FEI Tribunal continued:

*"There was sufficient evidence regarding the special circumstances that caused the PR's groom to feed the Horse and the mare after a hectic journey and in a state of fatigue [the experts] all testified that it was scientifically plausible...and an intentional application of the Prohibited Substance would not have served any purpose..."*

6.6 Al Eid points to the expert evidence of Dr Dunnett, who concluded that it was scientifically plausible that residual contamination at the stables at the Riyadh event

led to the levels of the Controlled Medications that were detected in the Sample and, also, to the evidence from the Team Veterinarian, Dr. Philippe Benoit. Al Eid notes that Dr. Dunnett's evidence was not contested by any contrary views from another expert.

- 6.7 Al Eid argues that the cumulative effect of the evidence demonstrates, on a balance of probability, that the source of the positive finding was the contaminated environment at the Riding School where the Horse was stabled prior to and during the Riyadh Event.
- 6.8 When considering the totality of the circumstances of the case, Al Eid submits that the following factors are relevant to a determination of his Fault or Negligence (or lack thereof):
- (a) The truly exceptional circumstances which resulted in the contamination of the stables, including:
    - i. The unclean state of the stables at an FEI certified event; and
    - ii. The exceptional weather conditions at the Riyadh Event;
  - (b) The extremely low levels of the Controlled Medications in the Sample and the fact that these could not have had any performance enhancing or therapeutic effect on the Horse at the time of the Riyadh event;
  - (c) The inadvertent nature of the ingestion of the Controlled Medications;
  - (d) The steps taken by Mr Al Eid to try and avoid the possibility of his horse ingesting any contaminated materials;
  - (e) The importance of the Riyadh Event such that Mr Al Eid had to compete at it notwithstanding his concerns about the state of the facilities.

- 6.9 The evaluation of No Fault or Negligence or No Significant Fault or Negligence should be guided by principles set out by the CAS in *Squizzato v. FINA* (CAS 2005/A/830) and *Puerta v. ITF* (CAS 2006/A/1025), which require examination of all of the circumstances of the case, always having regard to the overarching doctrine of proportionality.

Sharbatly

- 6.10 Sharbatly carried out extensive investigations to try and identify the explanation for the presence of the Controlled Medications in the Sample. This included tests on the supplements given to the horse and investigations conducted alongside the FEI Integrity Unit into the use of Bute at the Al Ain Equestrian Club.
- 6.11 While these tests and investigations point strongly to the explanation being the ingestion of the Controlled Medications through traces of residual contamination at the Al Ain Event, Sharbatly accepts that in spite of his best efforts the evidence he has

obtained in support of contamination being the explanation is not sufficient to demonstrate, on the balance of probabilities, that that explanation is the correct one.

6.12 Sharbatly submits that the Panel should take into account:

- (a) the steps taken by him to investigate the cause of the presence of the Controlled Medications in LOBSTER's Sample;
- (b) the evidence obtained by him as to possible explanations for the presence of the Controlled Medications in the Sample (in particular the expert evidence of Dr Dunnett which that shows that the levels of the Controlled Medications in the Sample are consistent with contamination); and
- (c) the evidence obtained by him which effectively rules out other possible explanations (including deliberate administration of the Controlled Medications)

6.13 Overall, Sharbatly contends that the circumstances of the case are such that it is wholly disproportionate and unjust to impose a penalty on him greater than two months. In addition to the matters referenced at above, these circumstances include:

- (a) The nature of the substances in question being controlled medications rather than doping substances;
- (b) The level of the Controlled Medications detected in the Sample being extremely low and incapable of having exerted any performance enhancing or therapeutic effect;
- (c) The upcoming Olympic Games;
- (d) The impact any greater period of suspension would have on the Saudi Equestrian Team;
- (e) Sharbatly's professionalism and commitment to the *ECM Rules* and their objectives; and
- (f) Sharbatly's apology.

#### Both Appellants

6.14 Sharbatly and Al Eid (further and in the alternative) submit that the sanctions imposed on them by the FEI tribunal were disproportionate, having regard to the particular circumstances of their respective cases.

6.15 Article 10.2 of the *ECM Rules* provides for a wide discretion in assessing the appropriate sanction as compared with the mandatory imposition of a two (2) year period of ineligibility under the FEI *Equine Anti-Doping Rules* (the "EAD Rules").

6.16 Proportionality has been consistently upheld as a general and fundamental legal principle which requires that discretion as to sanction be exercised in such a manner that the severity of the sanction imposed is just and in proportion to the seriousness of

the offence (*WADA v Stauber & Swiss Olympic Committee* (CAS 2006/A/1133); *Squizzato v FINA* (CAS 2005/A/830); *Hipperdinger v ATP* (CAS 2004/A/690)).

- 6.17 The exercise of discretion as to the appropriate sanction is wide, but it must be exercised in accordance with the principle of proportionality. In this regard, the Appellants argue that the FEI Tribunal took an unduly restrictive approach to the exercise of discretion and by doing so failed to take into account a number of relevant considerations which would and should have yielded a different outcome.

**B. Respondent's Submissions and Requests for Relief**

- 6.18 In summary, Respondent submits the following in defence.
- 6.19 There is no material dispute about the basic facts. Rather, the parties disagree only about the findings that may properly be made based on those facts.
- 6.20 In El Aid's case, the parties disagree about whether facts establish that it is more likely than not that the Bute got into the VANHOEVE's system as a result of inadvertent contamination due to unclean conditions at the stables at Riyadh Event.
- 6.21 Otherwise, the only dispute is as to whether the FEI Tribunal was entitled, in the exercise of its sanctioning discretion under Article 10.2 of the ECM Rules, to impose a period of ineligibility on the Appellant of eight months.
- 6.22 The FEI Tribunal is a knowledgeable and experienced tribunal. The procedure it followed was full and fair, and it clearly made its decision carefully and in good faith. Therefore the CAS Sole Arbitrator should proceed on the basis that the decision is entitled to 'respect' and he should not 'easily tinker' with it (see *Kendrick v. ITF* (CAS 2011/A/2518) at para 10.7).
- 6.23 According to the principles that govern the exercise of the Tribunal's sanctioning powers under Article 10.2, and taking into account all of the relevant facts and circumstances of this case, a four month sanction was warranted (the FEI made a similar submission to the FEI Tribunal). Counsel for the FEI noted that a four month sanction would be a "serious" sanction for a Bute violation.
- 6.24 A central and distinctive feature of equestrian sport is that it involves a partnership between two types of athlete, one human and one equine. One of those partners is unable to speak for itself, and therefore the FEI has assumed responsibility for speaking on its behalf, by taking every necessary step to ensure that, in every aspect of the sport, the welfare of the horse is paramount.
- 6.25 This responsibility is reflected in the ECM Rules, the purpose of which is not to preserve the integrity of the sport (which is the objective of anti-doping rules) but

rather ‘to ensure horse welfare and the highest levels of professionalism’ [EADCMR, p.5], by ensuring that medications (Controlled Medication Substances) and methods (Controlled Medication Methods) that are commonly (and appropriately) used to treat horses when they are not competing, are not used inappropriately in relation to horses that are in competition.

6.26 According to the FEI Medication Code (EADMCR p.29):

*All treatments must be given in the best health and welfare interests of the Horse. Therefore:*

- *Every treatment must be fully justifiable by the medical condition of the Horse receiving the treatment.*
- *Horses that cannot compete as a result of injury or disease must be given appropriate veterinary treatment. Persons Responsible and their Support Personnel must obtain advice from their treating Veterinarian or team Veterinarian prescribing a treatment and the necessary duration of treatment.*
- *No Controlled Medication Substance shall be given to any Horse during or close to an event unless the appropriate FEI guidelines for medication authorization have been followed.*
- *A complete and accurate record of all treatments during or close to an event should be maintained in the form of a Medication Logbook.*

6.27 The distinction between anti-doping and Controlled Medication rules has important ramifications in the present cases, where the Appellants are not accused of doping but, instead, are being held to account for the presence of a medication, Bute, in their competition horses’ systems without the required pre-authorisation. In particular:

- (a) It means that when it comes to assessing (for the purposes of sanction) the fault of the Appellants and the harm that their actions have caused, the assessment is to be made not by reference to the anti-doping imperatives but rather by reference to the specific and distinct objectives of the *ECM Rules* and the particular mischief that they are aimed at avoiding.
- (b) While the *ECM Rules* borrow some concepts from the *World Anti-Doping Code* (“WADC”), the primary imperative behind the WADC – the need to harmonise doping and sanctions for doping across all countries and sports – simply does not apply in the context of the *ECM Rules*. And that is reflected in the fact that the rigid system of sanctioning adopted in the WADC (fixed sanctions that cannot be departed from except in narrow circumstances where specific mitigating provisions are triggered) is not followed in the *ECM Rules*.
- (c) For example, while the *ECM Rules* borrow the WADC concept of elimination of sanction in cases of ‘No Fault or Negligence’ and “No

Significant Fault or Negligence”, if such a plea is not available on the facts then (unlike the *WADC*) the *ECM Rules* do not mandate the application of a fixed sanction, but, instead, still confer a broad discretion on the FEI Tribunal to determine a sanction (including a ban in the range of 0-24 months) that is fair and proportionate in all the facts and circumstances of the case, measured against the underlying objectives of the *ECM Rules*, and the specific mischief it is designed to prevent.

- 6.28 With respect to Al Eid’s defence of exceptional circumstances, pursuant to Article 10.4, the FEI Tribunal correctly rejected El Aid’s plea.
- 6.29 El Aid has not satisfied the pre-condition to application of Article 10.4, i.e., he has not discharged his burden of proving, on the balance of probabilities, how the Bute got into VANHOEVE’s system. In the regard:
- (a) It is not enough merely to deny intentional administration and to assert that ‘therefore’ the explanation must be inadvertent ingestion. Nor is it enough to establish that inadvertent contamination is a possible explanation on the facts and the science. Instead, the Appellant has to establish by adducing specific, competent and persuasive evidence that establishes the factual circumstances in which the Bute entered VANHOEVE’s system, that inadvertent contamination is more likely than not to have occurred.
  - (b) El Aid’s evidence shows (at most) that, as a general proposition, Bute was used therapeutically on horses stabled at the International Riding School where the Riyadh Event was held; and that some old bedding and old feed remnants were present in the stables when VANHOEVE arrived (although the Appellant got his groom to clean out VANHOEVE’s stable and the feed bucket, and put fresh shavings on top of the dirty shavings shortly after arrival, i.e., four days before the sample was collected). There is no evidence that Bute was used in the particular stable housing VANHOEVE, or had been administered to any of the horses occupying that stable prior to VANHOEVE, or indeed generally that Bute was used at the International Riding School in a way that could have led to contamination of the feed or the bedding in that stable. There is no evidence of any such contamination before or after the Riyadh Event, and nor did either of the other horses tested at the Riyadh Event test positive for Bute.
  - (c) Dr. Dunnett opined that if some of the old shavings or old feed present in the stable when VANHOEVE arrived had been contaminated with Bute residue, and if VANHOEVE had ingested some of those shavings or old feed ‘within a few hours of sampling’, or if there had been ‘sustained ingestion of phenylbutazone from the stall environment over the 3 to 4 day period immediately prior to the event’, that could have caused the presence of Bute and its metabolite at the very low levels found in VANHOEVE’s sample, making it ‘a plausible explanation’ for the laboratory’s finding in



this case. But that was speculation, not proof: ‘proof that [it] is scientifically possible is not proof that it did actually occur.’ (see *Camiro*, FEI Tribunal decision dated 22 December 2008 at para 72).

- 6.30 Even assuming that Al Eid had established it was more likely than not that the cause of the finding was inadvertent contamination in the stables at the Riyadh Event, to sustain his plea of No Fault or Negligence he would also have to show that he used ‘utmost caution’ to avoid such inadvertent contamination, he cannot do so, because there were a number of reasonable and practical steps that he could and should have taken to avoid inadvertent contamination, such as requesting a clean stable, or keeping VANHOEVE out of the stable until it had been thoroughly cleaned.
- 6.31 The starting point in the exercise of the Article 10.2 discretion is not a two year ban (as it would be under the *WADC*, with fault presumed and the Person Responsible having to justify any downward departure). Instead, under Article 10.2 of the *ECM Rules* there is no presumption of fault, so the starting-point is zero, and the tribunal has to decide to what extent (if at all) it should go up from there (to the maximum of 24 months) in all of the circumstances of the case.
- 6.32 The least serious sanction available should be considered first, and should only be rejected in favour of a more serious sanction if it is considered that the lesser sanction would be insufficient in the circumstances.
- 6.33 Furthermore, the discretion as to what length of ban (if any) to impose should be exercised ‘in the round’, i.e., in conjunction with any other discretion as to sanction conferred by the *ECM Rules*, ‘so as to arrive at a result that meets the justice of the case overall’. Thus, the tribunal also has discretion under Article 10.2 as to whether to impose a fine, and (if so) how much (up to CHF 15,000), whether to order the Appellant to contribute to the costs of the proceedings, and (if so) in what amount, and (under Article 10.1) whether to disqualify the other results obtained by the Appellant in the event in question. All of these factors must be considered, individually and collectively, in order to weigh up what is the least serious sanction necessary to vindicate the objectives underlying the *ECM Rules*, in all of the circumstances of the case at hand.
- 6.34 As a general principle the assessment of proportionality includes taking into account the impact of the proposed sanction on the athlete concerned, eg missing the Olympic Games. The commentary to the *WADC* (which specifically precludes consideration of what events will be missed in determining the proper sanction for a doping offence) does not apply directly in this case. Accordingly, if the conduct at issue was not so culpable, and the mischief caused was slight, that that would have to be weighed against the serious prejudice to the Appellants in missing the Olympic Games.

- 6.35 Any alleged prejudice to the Saudi Equestrian team would not be a relevant factor in the exercise of discretion under Article 10.2.
- 6.36 Other relevant considerations would include the FEI Tribunal's findings that:
- (a) Neither the Appellants nor anyone else on their team had knowingly administered Bute to their respective Horses.
  - (b) A professional team structure was in place with clear procedures for avoiding anti-doping rule violations. The Saudi Team employed a professional veterinary staff whom the Athletes had access to both during and outside of business hours
  - (c) Because the Bute was not deliberately administered to the Horses by the Appellants or any of their team, this is not a case where the horses were given a treatment that their medical conditions did not justify, nor was they given Bute in order to compete when they were not fit to do so, nor was there a failure to follow the guidelines for obtaining medication pre-authorisation. In other words, these cases do not involve the key mischiefs that the *ECM Rules* are designed to prevent.
  - (d) The violations raise no issues as to the welfare of the horses.
  - (e) The estimated levels detected in the Samples were very low and that these levels were consistent with a lack of performance-enhancing or therapeutic effect.
  - (f) When given notice of their respective violations the Appellants showed a responsible attitude and attempted to limit the adverse consequences for the sport (a) by promptly admitting the violation; and (b) by voluntarily suspending themselves from competition pending resolution.

## **7. JURISDICTION OF THE CAS AND ADMISSIBILITY**

- 7.1 Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

- 7.2 CAS jurisdiction to hear this appeal is derived from ECM Rule 12.2.1 which provides that in cases arising from participation in an International Event or in cases involving FEI-registered Horses the decision may be appealed exclusively to CAS. An appeal must be filed 30 days from the date of Receipt of the Hearing Panel decision by the

appealing party. Furthermore, each party confirmed CAS jurisdiction by signing the Order of Procedure.

- 7.3 The FEI Tribunal rendered its decisions on 23 May 2012. The Appellants filed their appeals on 24 May 2012 and are therefore admissible

## **8. APPLICABLE LAW**

- 8.1 Article R58 of the Code provides as follows:

*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

- 8.2 Pursuant to Article 36.3 of the *Statutes* of the FEI (23<sup>rd</sup> Edition, effective 6 May 2011), all disputes shall be settled by Swiss law.

## **9. ISSUES**

- 9.1 The standard of review on appeal and, in particular, whether there should be any deference to the FEI Tribunal's decisions.

- 9.2 In the case of El Aid, whether:

- (a) He has established on a balance of probabilities how the Bute entered VANHOEVE's system; and, if so
- (b) Whether he bears No Fault or Negligence or No Significant Fault or Negligence therefor.

- 9.3 Whether a reasonable application of the discretion afforded under ECM Rule 10.2 merits a reduction or change in the sanctions imposed on the Appellants by the FEI Tribunal.

## 10. MERITS OF THE APPEAL

### A The Scope of a Panel's Powers in an Appeal Procedure

- 10.1 The source of the Panel's powers under Article R57 of the *CAS Code* accords to the Panel "full power to review the facts and the law." The Panel "may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance." The Panel can, as it did in this case, hear the key witnesses and even receive testimony that was not provided to the FEI Tribunal.
- 10.2 While CAS decisions such as *WADA v. Hardy & USADA* (CAS 2009/A/1870) and *Wawrzyniak v. Hellenic Football Federation* (CAS 2009/A/1918) are cited for the proposition that the specialist tribunals of sport federations are entitled to considerable deference and, in particular, that the measure of the sanction imposed by a disciplinary body in the exercise of discretion given to it by the relevant rules should only be reviewed when the sanction is "evidently and grossly disproportionate to the offence", such principles do not limit a CAS Panel from correcting what it believes to have been an erroneous application of the rules or the imposition of a sanction which is unreasonable in all of the circumstances. As the Panel in *Kendrick v. ITF* (CAS 2011/A/2518) said (at para. 10.6):

*"Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where a tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS Panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision."*

- 10.3 The comments of the CAS Panel in *Bucci v. FEI* (CAS 2010/A/2283) at para. 13.46 are also apposite:

*"The Panel would be prepared to accept that it would not easily "tinker" with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so."*

10.4 The foregoing jurisprudence has, therefore, guided this Panel in the task at hand.

**B Whether Al Eid has Established the Existence of Exceptional Circumstances**

10.5 Article 10.4 of the *ECM Rules* provides for the elimination or reduction of a period of Ineligibility based on exceptional circumstances. The language of the Rule tracks, in large measure, the corresponding rule in Article 10.5 of the *WADC*. A key difference is that Article 10.4.2 (No Significant Fault or Negligence) does not limit the reduction of the otherwise applicable sanction to 50% of that sanction (a requirement of *WADC* Article 10.5.2). A key similarity, however, is that in order to engage the application of Article 10.4 of the *ECM Rules*, the Person Responsible (in this case, Al Eid) must be able to establish how the Controlled Medication Substance entered the Horse's system in order to have the period of Ineligibility and other Sanctions eliminated or reduced.

10.6 In the Panel's view, Al Eid has not met this burden.

10.7 The evidence of Dr. Abdelkarim, the treating veterinarian at the Riyadh International Riding School, provided an explanation for the fairly wide availability of Bute at the facility. It was argued that this evidence, when taken with all of the other evidence adduced by Al Eid, should have the cumulative effect of enabling Al Eid to meet his burden. The problem with this approach is that it would enable someone in the position of Al Eid to discharge his burden by putting forward a theory of inadvertent contamination and requiring that the theory be accepted, by default, because of the absence of any other explanation or evidence. As a CAS Panel observed in *International Wheelchair Basketball Federation v. UK Anti-Doping & Gibbs* (CAS 2010/A/2230), which was an anti-doping case involving a Specified Substance, at paragraph 11.5:

*"An athlete cannot by asserting even with what purports to be corroborative testimony to the same effect, that he did not intend to enhance sport performance thereby alone establishing how the substance entered his body. Seeking to eliminate by such an approach all alternative hypotheses as to how the substance entered his body and thus to proffer the conclusion that what remains must be the truth reflects the reasoning attributed to the legendary fictional detective Sherlock Holmes by Sir Arthur Conan Doyle in "The Sign of Four" but his reasoning impermissible for a judicial officer or body."*

10.8 While there is no suggestion of any improper behaviour on the part of Al Eid or members of his team, that is not the issue. Explanations as to the possible cause of the positive test, however plausible, will, as noted above, not be enough absent more than

tangible evidence. This Panel therefore agrees with the FEI Tribunal which concluded (at paragraph 47):

*“..... The Tribunal is however not persuaded by the explanation provided by Dr Dunnett that there was ingestion by contamination. The Tribunal finds that in the first place, insufficient evidence was offered by the PR regarding the alleged contamination. The Tribunal further considers that the PR’s groom had cleaned the stable shortly after the arrival, and thereby further reduced the risk of contamination. Furthermore, the Tribunal holds that insufficient evidence has been adduced to establish the causal link between the alleged contamination and the positive test result. It is therefore the opinion of the Tribunal that the PR has failed to prove that ingestion by means of exposure to a contaminated stable environment was more likely than not to be the source of the Phenylbutazone and Oxyphenbutazone...”*

## **C The Sanction under Article 10.2 of the ECM Rules**

- 10.9 The Panel is in substantial agreement with the submissions made by counsel for the FEI.
- 10.10 The starting point of this discussion is, once again, to emphasise a key difference between Article 10.2 of the *ECM Rules* and its relative, Article 10.4 of the WADC (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances).
- 10.11 Whereas under the WADC, the task is to determine by how much the presumptive sanction of 24 months should be reduced, having regard to the athlete’s degree of fault, the reverse process is followed under Article 10.2 of the *ECM Rules*. Instead, a first violation, in most circumstances, is dealt with through the Administrative Procedure, which would almost inevitably result in no period of Ineligibility being imposed on the Athlete at all.
- 10.12 Both of the appellants had previous infractions. However, those incidents were sufficiently long ago that they are regarded as having been “spent” for sanctioning purposes (i.e. the current charges were regarded as first offences) in the context of whether the Appellants should be sanctioned for multiple *ECM Rule* violations. For administrative purposes, however, the existence of the previous infractions remains relevant because it precludes the Appellants from electing to be dealt with in accordance with the Administrative Procedure.
- 10.13 A key element of the sanctioning regime provided by Article 10.2 of the *ECM Rules* is there is no presumption of fault. This stands in direct contrast to WADC Article 10.4. So the starting point is zero.

- 10.14 In *FIFA v. STJDF & CBF & Dodô* (CAS 2007/A/1370) and *NADA v. STJDF & CBF & Dodô* (CAS 2007/A/1376) it was noted that any exercise of sanctioning power is an interference with the rights of athletes. It is therefore necessary to weigh the objectives of the *ECM Rules* against the consequences of infringement, including the impact on the offender. The correct approach is to start low and only move up the scale if it is necessary to do so to meet the overriding objectives of the *ECM Rules*. “Fault” is not a specified yardstick to be employed in undertaking this assessment (again, a distinguishing feature between Article 10.2 and WADC Article 10.5).
- 10.15 Having regard to the two appeals before this Panel, the following factors are supportive of the conclusion that the culpability of the Appellants is at the low end of the scale:
- (a) The FEI Tribunal’s finding of professionalism (the Saudi professional team structure is at a very high end of the spectrum);
  - (b) The finding that there was no deliberate taking or administration of medication;
  - (c) The fact that when other medications were administered to the horses, ETUEs were routinely applied for;
  - (d) The lack of any evidence of harmful impact on the horses concerned;
  - (e) The lack of any welfare concerns relating to the horses;
  - (f) The lack of any reasonable explanation for the Athletes not to have sought an ETUE had they wished to use Bute on their horses;
  - (g) The levels of Bute detected in the horses’ systems were consistent with a lack of any possible enhancement of performance or therapeutic effect;
  - (h) The extensive investigation by the Athletes and their teams, their prompt admission to the charges and their acceptance of voluntary suspensions.
- 10.16 Although the FEI Tribunal made reference to a number of “comparable” cases in coming to a conclusion that eight month sanctions were appropriate, upon closer examination these cases cannot be regarded as appropriate comparables. In these cases horses had either been given a cocktail of medications and/or there were few mitigating factors.
- 10.17 By way of example, in *Cameo Renazar* (FEI Tribunal, 21 November 2011), after repeated attempts on the part of the FEI to obtain an explanation from the Person Responsible, the Person Responsible stated that he had given his horse a paste containing Bute prior to the Event in question, since the horse had shown signs of colic. When a questionnaire, completed by the Person Responsible, was eventually obtained, it indicated that prior to the competition in question, the horse had been treated by different veterinarians, but that specific information concerning the horse’s treatments was not available. The Person Responsible apparently attempted to resile from his previous admission by suggesting that the Bute detected in the horse’s

Sample must have been given to the horse by a veterinarian working at a particular stable. The FEI Tribunal concluded (at paragraph 25):

*“In the opinion of the Tribunal, however, the degree of fault or negligence of the PR is difficult to assess [sic] given the information provided. The PR has shown very little knowledge of the rules of the FEI, and shows even less signs of a determination to achieve regulatory compliance in the future.”*

- 10.18 While the foregoing comments were made in the context of an Article 10.4 analysis, they would presumably have informed the Tribunal’s subsequent evaluation of fault under Article 10.2. The result: a period of ineligibility of eight months.
- 10.19 In *Tiburon* (FEI Tribunal, 2 December 2011) a case involving the controlled medications Bute and Flunixin, the horse had been medicated for colic a few days before the event at which the horse was tested. The Person Responsible explained that he did not know that this treatment would be detectable as long as six days after administration. No ETUE had been applied for and there appears to have been non-compliance with the requirement to maintain an FEI medication log book, a record of who had administered medications to the horse and a lack of steps being taken by the Person Responsible to educate himself about the consequences of the treatment received by the horse. Again, while all of these comments were made in relation to the plea of exceptional circumstances, they no doubt informed that FEI Tribunal’s decision to impose a term of ineligibility of eight months.
- 10.20 Simply comparing the facts and circumstances of the instant appeals from those considered in the *Cameo Renazar* and *Tiburon* matters, it is readily apparent that the Appellants’ infractions were far less serious than those described in the other cases.
- 10.21 More fundamentally, however, the reasons of the FEI Tribunal leave the impression that the Tribunal approached the exercise of its discretion in the Appellants’ Controlled Medication cases in much the same way as a tribunal would look at sanctioning in a Specified Substance case under *WADC* Article 10.4.
- 10.22 Although the FEI Tribunal recites, in paragraphs 48 (*Al Eid*) and 55 (*Sharbatly*) of its decisions that the presumptive starting point of two years provided for in *EAD Rules* does not apply in cases of Controlled Medication substances, the FEI Tribunal goes on to say that because the Appellants failed to prove how the Controlled Medications entered their Horses’ systems, it was not possible for the Tribunal to assess the appellants’ “Fault or Negligence” for the *ECM Rule* violation.
- 10.23 Having stated that it was unable to assess “Fault or Negligence”, the FEI Tribunal goes on to say that it “is forced to take into account other, more objective factors in order to determine the period of Ineligibility.” (emphasis added)



- 10.24 It is worth repeating at this juncture that in exercising its discretion under Article 10.2, the key consideration should be the legal principle of proportionality, i.e., the sanction has to be commensurate with the seriousness of the offence, taking into account the underlying objectives of the *ECM Rules* and the mischief they are aimed at preventing. Or, in more formal terms, (i) the objectives being pursued must be sufficiently important to justify taking away an offender's right to pursue his or her profession, (ii) the sanction imposed must be rationally connected to the pursuit of those objectives, and (iii) it must go no further than is necessary to meet those objectives.
- 10.25 There is therefore a balancing exercise to be done. The Panel must assess (1) the culpability of the offender; and (2) the harm caused or risked by his offence, measured in each case by reference to the objectives of the rules in question and in particular the mischief that they are aimed at preventing. Against that, the Panel should weigh the impact of the sanction on the offender, and any mitigating factors.
- 10.26 Although the FEI Tribunal made reference to many of the factors which the parties on these appeals submit were relevant and correct, the Panel is of the view the FEI Tribunal erred by failing to take into account the effect of the eight month sanction (in particular that it would exclude both Appellants from the Olympic Games). Consistent with its general approach of considering these Controlled Medication cases in much the same way as an anti-doping case, the FEI Tribunal found that the reasoning behind the commentary in the *WADC* that the effect of the suspensions should not influence the period of Ineligibility selected was persuasive in an Article 10.2 case. By doing so the FEI Tribunal deprived itself of the opportunity to weigh the effect of a relevant factor.
- 10.27 Further, the FEI Tribunal appears to have applied little if any weight to the fact that under the Administrative Procedure, the Appellants' offences would not have generated any period of Ineligibility at all.
- 10.28 This Panel agrees with the FEI's submission that in deciding what is a necessary and proportionate sanction in these cases, it is fair to take account of the fact (which reflects the nature and purpose of the *ECM Rules*) that if the Appellants' previous offences had taken place more than eight years prior to the current offences, they would have been entitled to accept an administrative sanction for this present violation of a fine, costs and no period of Ineligibility. Specifically, the question would be: what makes this case different from an offence that would have attracted an administrative sanction only, and what greater sanction does that difference justify?
- 10.29 The fact is that the Appellants have infringed the *ECM Rules* previously, albeit seven years (in the case of *Al Eid*) and six years (in the case of *Sharbatly*). Having decided that those infractions should be taken into account when considering the exercise of discretion under Article 10.2, it would be reasonable to impose some period of

Ineligibility, in addition to the fines and costs awards that were imposed by the FEI Tribunal. The *ECM Rules* and, in particular, the principle of strict liability contained in those *Rules*, need to be respected and vindicated. The sanction imposed must therefore be meaningful and stand as a deterrent, particularly where, as here, the Administrative Procedure would not apply.

10.30 That said, even the four month period of Ineligibility which was suggested by the FEI would be a tough sanction, particularly having regard to the fines, costs, a period of voluntary suspension served and disqualification of results.

10.31 While there is inevitably an element of arbitrariness in selecting an appropriate sanction, the Panel has concluded that two months would be an appropriate period of Ineligibility in all of the circumstances of this case.

### CONCLUSION

10.32 This Panel would allow the appeals of Al Eid and Sharbatly to the extent that the eight month period of Ineligibility imposed on each of them by the FEI Tribunal should be reduced to two months. The starting date for the term of Ineligibility is 24 February 2012 in the case of Al Eid and 10 February 2012 in the case of Sharbatly.

10.33 The remainder of the FEI Tribunal's decisions dated 23 May 2012 are continued.

### 11. COSTS

11.1 Article R64.4 of the CAS Code provides:

*"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties".*

11.2 Article R64.5 of the CAS Code provides:

*"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel*

*shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties”.*

- 11.3 Having taken into consideration the outcome of the arbitration, and with the concurrence of the parties, the Panel is of the view that there shall be no costs associated with this award, save that the CAS Court Office fees of CHF 1,000 paid by each of the Appellants shall be retained by the Court.

## **DECISION**

### **The Court of Arbitration for Sport rules that:**

#### **A. CAS 2012/A/2807 *Al Eid v. FEI***

1. The appeal filed by Khaled Abdullaziz Al Eid on 24 May 2012 against the decision of the Fédération Equestre Internationale Tribunal (“FEI Tribunal”) dated 23 May 2012 is partially upheld.
2. Paragraph 52(1) of the decision of the FEI Tribunal dated 23 May 2012 is set aside and replaced with the following:

Khaled Abdullaziz Al Eid is sanctioned with a period of ineligibility of two months, commencing on 24 February 2012.

3. The remainder of the FEI Tribunal’s decision dated 23 May 2012 is confirmed.
4. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 paid by Khaled Abdullaziz Al Eid which shall be retained by the CAS.
5. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.
6. All other or further claims are dismissed.

#### **B. CAS 2012/A/2808 *Sharbatly v. FEI***

1. The appeal filed by Abdullah Waleed Sharbatly on 24 May 2012 against the decision of the Fédération Equestre Internationale Tribunal (“FEI Tribunal”) dated 23 May 2012 is partially upheld.
2. Paragraph 61(1) of the decision of the FEI Tribunal dated 23 May 2012 is set aside and replaced with the following:

Abdullah Waleed Sharbatly is sanctioned with a period of Ineligibility of two months, commencing on 10 February 2012.

3. The remainder of the FEI Tribunal’s decision dated 23 May 2012 is confirmed.
4. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 paid by Abdullah Waleed Sharbatly which shall be retained by the CAS.

5. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.
6. All other or further claims are dismissed.

Operative part of the award issued on 11 June 2012  
Lausanne, 17 July 2012

**THE COURT OF ARBITRATION FOR SPORT**

A handwritten signature in black ink, appearing to read 'Graeme Mew' with a stylized flourish at the end.

Graeme Mew  
Sole Arbitrator

## APPEAL BOARD - IT'S A MANS WORLD

(Retrieved from <http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/disciplinary/?result=535a309cb33ebfaa5320ed66> on 31/10/15)

Appeal Board reasons for its decisions in the appeals of MAURICE SINES, JAMES CRICKMORE, PETER GOLD, NICK GOLD and KIRSTY MILCZAREK

1. Following an eleven day hearing of an enquiry concerning five jockeys and six men described as bettors and another man who came into an entirely different category to the jockeys and bettors, the Disciplinary Panel found that charges against four of the jockeys and all of the bettors were made out. One of the jockeys, Kristy Milczarek, has appealed, as have four of the bettors: Maurice Sines, James Crickmore, Peter Gold and Nick Gold.
2. The charges against the jockeys were brought under Rules 157, 201(v) and 243 of the Rules of Racing. Kirsty Milczarek was charged under all three of the above Rules. The Panel acquitted her of being in breach of Rule 157 in respect of her ride on a horse, OBE GOLD, in the 19.00 race at Lingfield on 15 August 2009. But the Panel found her to be in breach of Rule 201(v) and Rule 243 in respect of the events surrounding that ride.
3. The bettors were all charged with breaches of Rule 201(v) in respect of 10 Races, the first being the 12.45 at Lingfield on 17 January 2009 and the last at Lingfield at 19.00 on 15 August 2009. Mr Nick Gold and Mr Peter Gold were involved only in the first seven races. The last race involved Milczarek. The ten races, the horses involved and the trainers and jockeys are set out at Annex A (Table 1) to these reasons. The charge in the case of each bettor was that he was concerned in a conspiracy with the other bettors and the jockeys to commit "a corrupt or fraudulent practice by placing lay bets and/or causing one or more of the Betting Exchanges account holders to place lay bets on the horse listed in Table 1 (the Named Horse) not to win (and/or be placed) in the Race using information he had received directly or indirectly from the jockey or other licensed person. The bettors were also charged alternatively with being in breach of Rule 220(ix) by causing a jockey to be in breach of Rule 243, namely supplying information for reward. The charges under Rule 201(v) were in all cases found to be proved.
4. Mr Sines and Mr Crickmore were further charged with a breach of Rule 247 in respect of two of the ten Races (Races 1 and 3) of causing bets to be placed on their behalf on a horse of which they were the owners. Mr Sines and Mr Crickmore were found to be in breach of this Rule in respect of both races.
5. The Rules cited above are Rules under the former Rules of Racing as the events happened before the new Rule Book came into force.

The allegations in more detail and the evidence

6. The Enquiry focussed on the running and lay betting on the horses in the ten races. The Panel summarised the allegations in paragraph 4 of its reasons:

“In broadest outline, the main case made by the BHA against those charged with a breach of the Rules was that they were doing their part in carrying out agreements to profit by lay betting from Races in which the jockeys either did or would if necessary ride to lose.”

7. The allegations were that Mr Sines and Mr Crickmore were the instigators in the conspiracy. It was alleged that they suborned the jockeys into agreeing to ride either to lose the race concerned or ready to prevent the horse from winning if it looked as if it might win. It was alleged that this information was used by Mr Sines and Mr Crickmore to cause lay bets to be placed on betting accounts held by the bettors on various exchanges. The accounts concerned, with other information to which we refer later, are set out in Annex B attached to these reasons. In two of the races (races 2 and 7) it was alleged not that the jockeys agreed to stop the horses but that they gave to Mr Sines and Mr Crickmore some “reliable adverse information” about the horses’ prospects in the race which prompted the lay betting.

8. The principal evidence adduced by the BHA at the Enquiry firstly consisted of analysis of the betting on the exchanges in respect of the ten races, together with analysis of the accounts in all other races between a period starting before race 1 and ending after race 2. In broad terms the BHA alleged that this analysis demonstrated that in respect of the ten races the pattern of betting, and in particular lay betting, was different from other days and involved much larger lay bets than on other Races.

9. Secondly, the BHA adduced evidence of telephone contact between the jockeys concerned in each race and Mr Sines and Mr Crickmore; telephone contact between Mr Sines and Mr Crickmore and the bettors at or around the times of each of the ten races; and evidence of telephone contact between the bettors and the betting exchanges at times close to the races.

10. Thirdly, the BHA relied on video evidence of the ten Races to demonstrate that the ride given by the jockey concerned was in breach of Rule 157 (failure to ride a horse on its merits) and Rule 243 (passing inside information).

11. The Panel found that all of the above factors was relevant evidence in determining whether the jockeys were in breach of Rule 157; and whether the bettors were participants in the conspiracy to place lay bets on horses which they knew would not be ridden on their merits, alternatively on the basis of inside information passed by the jockeys to the bettors.

12. The evidence in respect of the betting and telephone analysis was not in dispute. The context in which the betting and telephone evidence occurred and the inferences to be drawn from this evidence were in dispute.

The ten races

13. We set out at this point in summary the Panel's finding in respect of nine of the ten races. They form the essential background to the issues in the appeals of Messrs Sines, Crickmore and the two Golds. We deal with the tenth race separately. It is the only race in which the jockey has appealed. The three jockeys involved in the other races and who were found guilty of breaches of the Rules have not appealed either the findings of breach or the penalties. The jockey concerned in race 3 was acquitted of all breaches of the Rules with which he was charged.

#### Race 1

14. Annex A shows that this race involved a horse called IT'S A MANS WORLD, ridden by Jimmy Quinn in the 12.45 Race at Lingfield on 17 January 2009. The horse was trained by Peter McBride. There is no dispute that at the time of the race it was owned by Mr Sines and Mr Crickmore. The horse started at 11/8 favourite but was beaten into second place. There was an allegation that Quinn's ride was in breach of Rule 157. This was rejected by the Panel although it found that Quinn did not ride the horse according to the trainer's instructions, but followed the instructions of the owners, Mr Sines and Mr Crickmore, who had instructed him to bring the horse late in the Race, contrary to the trainer's instructions which were to "go forward and make use of him" or similar words to that effect.

15. The Panel found that both Mr Sines and Mr Crickmore, despite their denials, were involved in lay betting on this horse contrary to Rule 247, at the time, it being owned by Mr Sines and Mr Crickmore. They further found that Mr Sines and Mr Crickmore had used their position as owners to arrange for Quinn "... to adopt their preferred tactics which helped to give them sufficient confidence to organise the lay betting".

16. The Panel further found that Mr Sines and Mr Crickmore had endeavoured to conceal their ownership of the horse by persuading the trainer to allow it to run in his colours rather than their own colours. In addition, they found that Mr Sines had endeavoured to influence the odds on IT'S A MANS WORLD more favourably for lay betting by making spoof attempts to back the horse with bookmakers for sums which he knew would not be accepted.

17. The lay bets placed on the betting exchanges are summarised in Annex B.

18. There is no dispute that the following accounts were registered in the names of or used by Mr Peter Gold and Mr Nick Gold: chelseaboy55, goldylocks and Nickgold. The other accounts were registered or used by men associated with Mr Sines and Mr Crickmore.

#### Race 2

19. The horse, SILK GALLERY (USA), was also ridden by Quinn. This race took place on 7 February 2009 at an evening meeting in Wolverhampton. In respect of this race the Panel found that Quinn passed on to Mr Sines and Mr Crickmore adverse information about the horse's prospects which caused both men to organise lay betting channelled through Mr Peter Gold's Betfair account, chelseaboy55. During the course of the day of the Race £50,000 was deposited into this account. As in all the other eight Races the horse did not win and the lay bet was



successful.

#### Race 3

20. We need not deal with this Race in any detail. It involved the running of IT'S A MANS WORLD at a time when the Panel found it was still owned by Mr Sines and Mr Crickmore. The Panel found that Mr Sines and Mr Crickmore had sought to conceal their ownership, no doubt to prevent them from being charged with laying their own horse contrary to Rule 247. The Panel acquitted the jockey of any untoward conduct in respect of his ride on this horse. It found that Mr Sines and Mr Crickmore were inspired to instigate lay bets because of their opinion that the horse was very unlikely to win. Annex B shows that lay bets were placed on the chelseaboy55 account and with a number of accounts used by associates of Mr Sines and Mr Crickmore.

#### Race 4

21. This Race was run on 1 March 2009 at Lingfield. The horse involved was EDITH'S BOY (IRE), trained by Simon Dow and ridden by one of the jockeys charged as being party to the conspiracy, namely Paul Doe. In the Race the horse started at 9/2 and finished 4th.

22. Doe consented to be interviewed by a BHA official but refused to attend the Enquiry. The Panel found that in his interview he lied about his knowledge of Mr Sines and Mr Crickmore. The Panel scrutinised the video recordings of the race with great care and despite a contrary opinion of the Stewards and Dow found that Doe's riding was in breach of Rule 157. They found that his riding was motivated to ensure lay betting by Mr Sines and Mr Crickmore. They further found that contacts by telephone between Mr Sines and Doe's girlfriend on the same day but before the race, were made to conceal Mr Sines' contact with Doe in respect of his riding.

23. As with other races, evidence of telephone contact between Mr Sines and Nick Gold shortly before the race, followed by lay betting, was found by the Panel to confirm use of the information given to Mr Sines by Doe, inspired the lay bets.

#### Race 5

24. On 5 March 2009 at an evening meeting at Wolverhampton, Gregg Fairley rode a horse called THE STAFFY (IRE). The horse did not win and lay bets on it were successful. Fairley attended interviews with the BHA investigators. Initially he denied any knowledge of Mr Sines and Mr Crickmore. But after being shown a photograph of Mr Sines he said he knew a man called Fred who spoke to him about horses and telephoned him from time to time.

25. The Panel found that Fairley's riding of THE STAFFY (IRE) in this race was in breach of Rule 157. They also found that Doe was used as an intermediary in telephone contact between Fairley and Mr Sines to transmit information from Fairley to Mr Sines. Again, the Panel found that this was to conceal Mr Sines' contact with Fairley.

#### Race 6

26. This race involved a horse called KING OF LEGEND (IRE) which ran in the 19.20 on 20

March 2009 at Wolverhampton and ridden by Fairley. In respect of Fairley's riding in this race the Panel did not find that his ride was in breach of Rule 157. However, they did find that it was unnecessary for Fairley to take any steps to prevent the horse from winning, but that if it had been necessary he would have done so. Again, in respect of this race the Panel found Doe was used as an intermediary between Mr Sines and Fairley. Brief details of the lay betting in this race appear in Annex B.

#### Race 7

27. The horse in this race was SHERJAWY, ridden by S Hitchcott in the 18.50 at Kempton Park on 8 April 2009. Doe was alleged by the BHA to have passed on inside information given to him by Hitchcott in an unguarded moment. The Panel found Hitchcott was innocent of all wrongdoing in respect of his part in this matter but they found Doe was not entitled to pass this inside information on to Mr Sines. Lay bets were made in respect of this race on the three accounts set out in Annex B.

#### Race 8

28. The race concerned was a Race at Bath on 23 July 2009. The horse, TERMINATE (GER), was ridden by Doe. In respect of this race the Panel found that Fairley was used by Mr Sines as an intermediary between him, Mr Sines and Doe; the reverse of the process in Races 5, 6 and 7.

29. The Panel found that Doe's ride was in breach of Rule 157. They further found that they "... were sure that Doe was passing on information for reward ..." in breach of Rule 243 (the prohibition on passing inside information).

#### Race 9

30. This race was run at 19.55 at Catterick on 14 August 2009. The horse involved was OBE GOLD and was ridden by Fairley. The Panel found Fairley's ride was in breach of Rule 157. They found that Fairley's dealings were made directly with Mr Sines, which led to the conclusion that Fairley deliberately failed "... to make the necessary substantial effort" when riding the horse in the race. The Panel was also "sure" that Fairley was, for the races in which he rode, passing information and riding to lose if necessary in return for reward from Mr Sines and Mr Crickmore.

31. We leave the Panel's findings in respect of race 10 to the appeal of Milczarek. Further findings in respect of Mr Sines and Mr Crickmore and their connection with Mr Nick Gold and Mr Peter Gold

32. It was common ground before the Panel that towards the end of 2008 Mr Sines and Mr Crickmore had entered into a partnership with Mr Nick Gold to place bets on Mr Nick Gold's and his father's betting account. This partnership, as it was described, provided a way for Mr Sines and Mr Crickmore to place bets on the exchanges, their accounts having been stopped. The agreement was that Mr Sines and Mr Crickmore nominated the horses and the bet and Mr Nick Gold arranged for bets to be placed either on his own account or with his father's accounts. Mr

Nick Gold said that the bets were made on a fifty-fifty split between Mr Sines and Mr Crickmore on the one hand and him and his father on the other. The Golds provided the credit for the bets.

33. Mr Nick Gold's description of the partnership was that the bets were principally to be lay bets, although some back bets were also made. He said the first of the lay bets was made on race 1. Both Mr Sines and Mr Crickmore denied being concerned with this bet. Indeed Mr Sines said he had never made lay bets. The Panel preferred the Golds' evidence on this issue for reasons which are set out in paragraph 70 of their decision.

34. The findings on the partnership in the seven races in which they were involved are set out in paragraphs 72-80. The Panel found that all the lay betting through Mr Nick Gold on the Gold accounts and through a commission agent, Mr John Loftus on race 4, were lay bets by Mr Sines and Mr Crickmore in partnership with Mr Nick Gold. The Panel further found that "... there is a wealth of evidence to show that Mr Crickmore either used directly himself those other accounts identified as carrying out heavy lay betting in the ten races – see Annex B – or arranged for these bets to be placed by others using those accounts"; and that the bets were made on behalf of himself and Mr Sines.

35. Save for the first ground of appeal, the standard of proof, there is no challenge on behalf of Mr Sines and Mr Crickmore to these findings.

36. So far as Mr Nick Gold is concerned, the Panel, correctly in our judgment, posed the crucial issue in the following terms; "Ultimately, the question whether Nick Gold was a part to the conspiracy ... depended upon whether he knew that the lay bets ... were inspired by inside information". In paragraphs 191 to 197 the Panel set out their reasons for concluding that Mr Nick Gold did not know that Mr Sines and Mr Crickmore had secured the agreement of jockeys to stop horses, but did know that the bets were inspired by inside information adverse to the horses' prospects in these ten races.

37. In paragraph 204 the Panel set out its reasons for concluding that Mr Peter Gold also was a party to the conspiracy on the same basis as his son. The Panel further concluded that the three other bettors involved in the Enquiry, Liam Vasey, David Kendrick and Shaun Harris, were parties to the conspiracy on the same basis as the Golds.

By the Grounds of Appeal: Standard of Proof

38. There is one ground of appeal which is common to all the Appellants. The Rules of Racing provide at Schedule (A)6 paragraph 16:

"Where any fact or matter is required to be established to the satisfaction of the Authority, the standard of proof shall be the civil standard which is to say the standard applied in the civil courts of England in a dispute between private Persons concerning a matter of comparative seriousness to the subject matter of the enquiry."

This provision, as the Panel recorded, first entered the Rules of Racing in 2001

39. It was submitted by counsel for Mr Sines and Mr Crickmore and leading counsel for the Golds, that the appropriate standard for proving the breaches of the Rules of Racing alleged by the BHA was the criminal standard. The Panel rejected these submissions and ruled that the appropriate standard was the balance of probabilities. In so doing the Panel specifically referred to the decision of the House of Lords, *In re Doherty* 2008 UK HL and *In re B (Children)(FC)* [2008] UKHL 35. All of the appellants challenge this ruling by the Panel and submit that the standard of proof for these breaches ought to have been the criminal standard.

40. Mr Jason Bartfeld submitted that the Rule should be construed on the basis of the law in 2001 and not 2011. He submitted that the part of the Rule which reads: “ ... in a dispute between private Persons concerning a matter of comparative seriousness to the subject matter of the enquiry” indicates that the standard to be applied depends upon the subject matter of the case in hand. As such, the charges against his clients were, he submitted, so serious that the criminal standard of proof should have been applied. This was the position, he submitted, before the decision *In re B*. He submitted that the Rule applies a flexible standard of proof to be tailored to the nature of the charge and the seriousness of the consequences. Thus it is submitted the Panel should have applied the criminal standard of proof.

41. Mr Jonathan Caplan QC, counsel for the Golds, submitted that the speeches in the House of Lords *In re B* left open some categories of dispute which despite being subject to the civil standard of proof required the application of the criminal standard. He submitted the charges against his clients, being allegations of corruption and fraudulent conduct, together with the consequences of a finding of such conduct by the Golds, are so damaging to their reputation that they should have been proved to the criminal standard. Mr Caplan pointed out that, unlike the other Appellants, the Golds were not licensed under the Rules of Racing and were not strictly bound by them. In the alternative Mr Caplan relied on a passage in the speech of Baroness Hale *In re B* in which she cited with approval a passage in a judgment of Ungood-Thomas J *In re Dellow's Will Trusts* [1964] 1 WLR 451,455:

“The more serious the allegation the more cogent is the evidence required, to overcome the unlikelihood of what is alleged and thus to prove it.”

42. Mr Ian Winter QC, leading counsel for Milczarek, supported the submissions of Mr Caplan. He accepted that following *In re B* there are now only two standards of proof: the balance of probabilities and beyond reasonable doubt. He accepted that the effect of *In re B* was to disapprove preceding authorities which indicated that the balance of probabilities might have gradations of different standards. He submitted that the seriousness of the allegations against Milczarek and the consequences to her of being found in breach of the Rules made it appropriate to apply the standard of beyond reasonable doubt.

43. In his skeleton argument Mr Winter referred the Board to decisions of the High Court in proceedings involving a number of different circumstances and facts where the court held that the standard of proof was the criminal standard. In the alternative Mr Winter relied on a passage in the speech of Lord Nicholls in *re H (Minors)* [1996] AC 563 at 586:

“... the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

44. Mr Mark Warby QC, counsel for the BHA, submitted that the Panel adopted the correct standard of proof, namely a balance of probabilities. He relied on the words of the Rule in Schedule (A)6 paragraph 16 as making it clear that the civil standard of proof was applicable and that this was further made clear by the reference to disputes between private Persons, not public bodies. He further submitted that the fact that jockeys were licensed each year on terms which included an undertaking to abide by the Rules of Racings, imported into the Rule the law as it is today.

45. In our judgment the standard of proof in these proceedings before the Panel is the balance of probabilities. The Rule in paragraph 16 makes it clear that the standard of proof is the civil standard. Lord Hoffman and Baroness Hale made clear in their speeches that the so-called heightened standard of proof in civil proceedings was no longer good law. We do not accept that this standard must be adopted because paragraph 16 was promulgated before *In re B* was decided. The House of Lords, now the Supreme Court, declares what the law is and always has been. There is, in our judgment, no room for construing paragraph 16, as importing, and bound by, the law as it was or may have been in 2001.

46. We accept Mr Winter’s submission that Lord Hoffman swept away the gradations of different standards of the civil burdens of proof. What he and Baroness Hale stressed was that in applying the balance of probabilities, “Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities”. Baroness Hale similarly said:

“When assessing the probabilities the court will have in mind as a fact (to whatever extent is appropriate in the particular case (emphasis added by Baroness Hale) that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

47. Although, as we accept, the charges against these appellants were serious and the consequences, particularly for the jockeys were serious, they were not criminal proceedings. They do not come into any of the cases in the first category referred to by Lord Steyn in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787. Further, we are not helped by

standards adopted by other bodies or standards applied where the penalties followed criminal proceedings. The BHA has a duty to ensure that the integrity of racing is preserved. In our judgment it is entitled to provide for a standard of proof, namely the civil standard of proof which in our opinion is appropriate and, as we find, fair.

48. We accept that in making its findings the Panel should use its common sense in the way explained by Lord Hoffman. We further accept that these were serious allegations and that cogent evidence was required to prove the allegations. However, it is clear that the standard of proof was debated before the Panel. In re B was referred to in the Panel's reasons and we are quite satisfied that the Panel had in mind the observations made by Lord Hoffman and Baroness Hale to which we have referred. In our judgment the Panel applied the correct standard of proof.

The appeal of Mr Sines and Mr Crickmore

49. In addition to the ground of appeal relating to the standard of proof Mr Sines and Mr Crickmore relied on a second ground. This ground alleged that there was insufficient evidence on which the Panel could reasonably have found, as it did, that the lay betting was extraordinary and founded on corrupt and/or inside information. Alternatively the Panel ignored undisputed evidence to the contrary which resulted in their reasons being insufficient.

50. This ground can be divided into three parts. Firstly, it was submitted that the Panel relied on evidence of lay betting by Messrs Sines, Crickmore, Nick Gold and Peter Gold on the ten Races which represented only a snapshot of lay betting carried out by the partnership. It is submitted that there was unchallenged evidence of many more bets being made by four men (the wider picture). If these bets were taken into account it was submitted that any statistical analysis would or might provide an entirely different picture of the betting. It was argued that the Panel's finding that the lay bets in respect of the ten races was extraordinary was made on a false basis.

51. Mr Warby on behalf of the BHA submitted that this submissions failed to take into account a number of factors. Firstly, the betting on the Races was not confined to bets made by the partnership. The evidence, which the Panel accepted, shows that lay bets were made on accounts of the bettors who were associated with Mr Crickmore. These are the other accounts set out in Annex B. Mr Warby submitted that the telephone time-lines support the Panel's finding that Mr Crickmore used other accounts directly or indirectly to place lay bets on the ten races. Secondly, it was submitted that neither Mr Sines, nor Mr Crickmore nor the Golds adduced any clear evidence of a wider picture of betting other than mere assertion.

52. The Panel had before it evidence from Mr Mark Phillips, the Principal Betting Investigator of the Integrity Services and Licensing Department of the BHA. His evidence, in the form of a witness statement with schedules attached, was read into the evidence. Mr Phillips had analysed all the accounts referred to in Annex B. He analysed these accounts for the days of the ten races and also over the whole period on which they were open and being used. That period obviously included the ten race days. The result of his analysis in relation to the ten Races demonstrated heavy lay betting on the named horses (see Annex B comment column). Both Mr Bartfeld and

Mr Caplan accepted that the analysis demonstrated a “spike” in the amount of lay betting in respect of the ten races. In his witness statement Mr Phillips said:

“It is clear from the figures and graphs exhibited in MP9 that in the vast majority of cases the horses were laid by the suspicious accounts far in excess of their normal or average limits.” And earlier in his statement,

“The fact that often the suspicious account alone traded greater volumes than all Betfair’s customers did on shorter priced horses shows demonstrates just how confident the suspicious accounts were that these horses would not be placed.”

53. In our judgment this unchallenged evidence demonstrated, as was asserted on behalf of the BHA, confidence by the bettors in the prospects of the lay betting being successful. Further, although there may have been other bets, lay or back bets, made over the period the accounts were being operated, it was open to the Panel to find that judged in the context of their findings in respect of the ten races, this evidence was significant.

54. It was argued before the Panel and the Board that all of the four bettors were very rich men used to backing horses or taking financial risks in other circumstances, for very large sums. This may well be so, but it does not in our judgment overcome the fact that in these ten races the lay bets on the betting accounts were far in excess of their “normal or average limits”. In addition, Mr Phillips’ evidence in Annex B demonstrated that the risks taken by the lay bets on these accounts for the ten races were for the most part at the top end of the risks taken by all other accounts for the individual exchange (see the comments in Annex B).

55. So far as Mr Sines and Mr Crickmore are concerned we reject this ground of appeal. We discuss it further later in our discussion of the Golds’ appeal.

56. Secondly, it is submitted on behalf of Mr Sines and Mr Crickmore that in reaching their conclusions on Mr Crickmore’s part in the conspiracy the Panel erred in finding that Mr Crickmore lied by denying any involvement in lay betting for the ten races (paragraph 68 of the Panel’s reasons) and in particular denied being involved in lay betting on races 1 and 3 (paragraph 77 of the Panel’s reasons).

57. Again, we reject this ground of appeal. In evidence Mr Crickmore was taken through the betting on each of the races. In respect of race 1 he denied being involved in any lay bet through any account. As to the other races in respect of some he said he was unable to remember whether he was involved in lay betting; in others he accepted lay betting on his own account. In respect of none of these races did Mr Crickmore unequivocally accept that he was responsible for lay bets on other accounts. The general tenor of his evidence appears to have been an attempt to distance himself from lay betting. The Panel found him to be party to the conspiracy and connected, with others, apart from the Golds, who had also placed lay bets on these races. In our judgment on the whole of the evidence which included Mr John Gardner’s (the BHAs Principal Intelligence

Analyst) evidence of telephone call time lines, the Panel were entitled to conclude that Mr Crickmore placed lay bets directly or indirectly through the accounts of known associates.

58. Thirdly, it was contended on behalf of Mr Sines and Mr Crickmore that the Panel attached too much weight to remarks made by Mr Sines in a telephone call between himself and Mr Jon Dunn, a BHA Investigator. It was also submitted that the contents of the telephone call were never put to Mr Sines.

59. The Panel commented on this part of Dunn's evidence when dealing with evidence about Mr Sines' contact with jockeys. In the decision the Panel said:

"During a telephone call with Jon Dunn ... he (Sines) said that he could leave racing 'in tatters' if he was taken to court, as he would talk about all the other jockeys and trainers he had spoken to. And in evidence before the Panel he asked why no big jockeys were being prosecuted against, a question he answered – "it's what suits". This was a curious line for Mr Sines to take, as implicit within it is an allegation that "big jockeys" with whom he was familiar were parties to corruption". (Paragraph 82 of the decision).

60. We understand this evidence came before the Panel in Dunn's witness statement and exhibits which were put before them in accordance with its usual practice. Dunn was asked about this conversation in evidence-in-chief. He confirmed it as correct. It is clear from the transcript of his evidence that Mr Sines was also asked about this conversation. He denied using the word "tatters"; a word which he said he never used and did not know what it meant.

61. Mr Warby submitted that the Panel did not put "significant weight" on this evidence. It was, he suggested, a comment made in passing. Whether the Panel did or did not put any significant weight on this evidence is not entirely clear. However, if it did, it was as the Panel observed a "curious line" for Mr Sines to take for the reasons stated by the Panel. In no way can this criticism vitiate the Panel's decision.

62. Taken as a whole the BHA's case against Mr Sines and Mr Crickmore was, in our judgment, a strong one. The findings in respect of the riding by the two jockeys who were found to be in breach of Rule 157, together with the evidence of the telephone contact between Mr Sines and Mr Crickmore with the jockeys, followed by betting on the exchanges in respect of the ten races was, in our opinion, powerful evidence in support of the BHA's case. In our judgment none of the grounds of appeal succeed and these appeals must be dismissed.

The appeal of Mr Nick Gold and Mr Peter Gold

63. In addition to the ground of appeal on the standard of proof, there are two further grounds of appeal. They are:

- (1) The Panel's decision was unreasonable, unfair and based on insufficient evidence; and
- (2) the Panel erred in its construction of Rule 201(v).



64. In opening his submissions in respect of the Golds' appeal, Mr Caplan sought to emphasize what he submitted were three major weaknesses in the BHA's case against the Golds. Firstly, he submitted that too much emphasis was placed by the BHA on the size of the lay bets. It was submitted that the Golds were very wealthy men, something which the BHA accept. Mr Caplan submitted therefore there was nothing extraordinary in the betting pattern presented by Mr Phillips.

65. Secondly, after the chelseaboy55 account was closed down on 9 March 2009, the Golds continued to place lay bets on their other accounts on the nomination of horses by Mr Sines and Mr Crickmore. It was submitted that had the Golds been aware of inside information from the jockeys they would never have continued to accept nominations for lay bets.

66. Thirdly, it was accepted that during the betting partnership there occurred an unpleasant and violent incident involving Mr Sines and Mr Crickmore and John Loftus, a commission agent, used by the Golds to place bets. The cause of this incident was a belief by Mr Sines and Mr Crickmore that the Golds were in some way "rumping", that is cheating, Mr Sines and Mr Crickmore of proceeds of the lay bets. It was argued by Mr Caplan that the Golds would never have gone on taking lay bet nominations from Mr Sines and Mr Crickmore after this incident had they been aware that the bets were inspired by inside information.

67. We bear in mind these submissions when reaching our own decisions on the Golds' appeal. However, they were factors of which the Panel were well aware and plainly took into account when they reached their decision.

68. We turn to the first ground of appeal. This ground can also be divided into several different headings. Firstly, the unfairness was essentially a criticism of the way in which the case against the Golds was presented by the BHA. It was submitted that the gravamen of the BHA's case against all the bettors was that they knew that the lay bets were inspired by information that the horses would be stopped by their jockeys from winning. The alternative basis in respect of the charge of conspiracy that the bettors were aware of inside information supplied by the jockeys, but unaware that they had agreed to stop the horses, was, it was submitted, not clear in the charge and in the way the case was put by the BHA in the written papers or orally.

69. Mr Caplan referred to passages in the charge, the Topics for Enquiry, the BHA opening note, and the BHA core summary. Mr Caplan submitted that although he applied for particulars of the way the alternative case was put, none were forthcoming.

70. We have carefully considered the documents to which we have been referred. We accept that the first basis of the charge, namely that jockeys agreed to stop horses, was no doubt in the forefront of the BHA's case and as such featured prominently in the evidence and the way the Enquiry proceeded. But we do not accept that the alternative case received so little attention that the Panel's findings in respect of it can be said to be unfair.

71. In its Opening Note the BHA stated:

“The BHA’s primary case is the information was in 8 of the 10 Races that the jockey had agreed to take steps to prevent the horse from winning or being placed. In the other 2 Races, and in the alternative in the 8 just mentioned, the information was some other reliable adverse information about the horse’s prospects in the Race.”

72. In our opinion, this statement clearly flagged up the alternative way in which the charge of conspiracy was put. In addition, races 2 and 7 were only ever put on the basis that the jockey had provided inside information. Finally, we accept Mr Warby’s submission that a question put in examination-in-chief to Mr Nick Gold demonstrated that the Golds were aware of the alternative basis of the charge:

“To be clear did they ever say to you ‘Don’t worry Mr Gold – we are in with a number of jockeys and the bets I give you will be either inside information which will give you an edge, or because the jockey is not going to try to run on the merits’”.

In our view this question demonstrates that counsel and Mr Nick Gold were well aware of the alternative basis in which the case against the Golds was put.

73. The second way in which this ground of appeal is put is the submission that the evidence was insufficient to support the Panel’s decision on the alternative basis in the charge. It was submitted by Mr Caplan that unless the inside information could be identified no conclusion could properly be made as to whether the information was prohibited by the Rules of Racing and/or was generally known to the market, or the person who might have been responsible for passing it. Mr Caplan relied on the definition provided by the Rules and Annex N of the Guidance for Trainers and Jockeys as showing that information of a kind which can properly be described as Inside Information according to Rule 243 can legitimately be passed on by a trainer or jockey.

74. We accept that the guidance to trainers and jockeys on the circumstances in which trainers and jockeys may pass on information not in the public domain are not as clear or helpful as might be expected. But at no stage was this a live issue raised by either of the Golds. At no time did either Mr Nick or Mr Peter Gold raise the issue of whether or not they knew the information was inside information. Mr Peter Gold had no contact with either Mr Sines or Mr Crickmore. Mr Nick Gold was the one who spoke to Mr Sines and Mr Crickmore before the lay bets were made. Mr Nick Gold’s evidence was that he never asked for the reasons why a horse was nominated for a lay bet. He said that at no time did he know that Mr Sines or Mr Crickmore had spoken to the jockey riding the nominated horse. The issue was, therefore, whether or not Mr Sines and Mr Crickmore had passed on to Mr Nick Gold some adverse information on the nominated horse’s prospects in the race. The Panel found that they did.

75. Next it was submitted that the evidence was not sufficient to justify the Panel drawing the

inference from all the available evidence that the Golds had been passed inside information from jockeys by Mr Sines and Mr Crickmore. Mr Caplan submitted that the factors relied on by the Panel in paragraphs 196 (Mr Nick Gold) and 204 (Mr Peter Gold) were insufficient for such inferences to be drawn. He went on to criticise the Panel's findings in respect of some of those factors of which criticisms are made.

76. In paragraph 196(i) the Panel found that the telephone evidence showed that discussions between Mr Nick Gold and Mr Sines and Mr Crickmore were of such a length that they must have been more than just an indication of the nominated horse, and the amount of the lay bet. The Panel relied on the length of the telephone calls as demonstrating that the conversations were not just a simple nomination for the lay bet and the amount to be risked. The number of telephone conversations and the length of each is taken from time-line schedules. The times were put to Mr Nick Gold in cross-examination by Mr Warby. It is clear from this cross-examination and the evidence of Mr Gardner who compiled the time-lines that the telephone calls in total in respect of each race were more than just very short conversations. In addition, common sense indicates that Mr Nick Gold and his father, who were providing credit for the lay betting would want to have some idea as to why Mr Sines and Mr Crickmore believed the horse would not win. In this connection we note the comment made in interview by one of the bettors, Vasey. As put to Mr Crickmore, Vasey had said "Well, if he's talking to me and he knows how it's worked, what the riding instructions are, all this sort of stuff, he knows all that, why would I go: 'Oh, do you own this one, Jimmy'. I'm getting the information anyway, aren't I?". Mr Crickmore's response to questions about this comment was at first evasive and then a denial. In our view it was for the Panel in respect of each race to judge the significance of the time taken and the number of telephone calls between Messrs Sines, Crickmore and Nick Gold to determine their significance. The Panel was, in our judgment, entitled to describe these conversations as detailed.

77. In paragraph 196(ii) the Panel referred to the closing of the chelseaboy55 account on 9 March 2009 for integrity reasons. The Panel regarded the fact that the partnership continued after the closure of this account as significant. At paragraph 196(iv) the Panel also relied on the incident involving the confrontation between Messrs Sines and Crickmore and John Loftus, the commission agent, as significant. Mr Caplan submitted that neither of these two incidents was of sufficient weight for the Panel to use them as an indication that the Golds were obtaining inside information when they continued to accept nominations for the partnership following these incidents. We do not agree. It is right to observe that these two factors could be described as pointing both ways. But they are factors which in our opinion the Panel were entitled to take into account having heard the evidence of both Mr Nick Gold and Mr Peter Gold in respect of these incidents.

78. At paragraph 196(iii) the Panel stated that in a letter dated 22 February 2010 the BHA asked Mr Nick Gold for an interview. He refused but in a letter dated 3 March 2010 Mr Nick Gold stated "to clarify my position, I back and lay horses on the figures ..." The Panel is criticised for describing this as deliberately false. It is submitted this was an unfair comment since Mr Nick Gold had, he said, been advised by his solicitor that he need not say anything. Mr Caplan pointed

to the fact that subsequently in the Schedule (A)6 form Mr Nick Gold gave a full account of the partnership and his dealings with Mr Sines and Mr Crickmore.

79. Similar factors were relied on by the Panel in the case of Mr Peter Gold. These are contained in paragraph 204 of the Panel's decision. As with Mr Nick Gold, the Panel relied on the fact that in an interview with Jon Dunn in September 2009 Mr Peter Gold was, as the Panel described, "... careful not to disclose the partnership which his son had recently had with Mr Sines and Mr Crickmore, though there were opportunities to do so". It is said that this comment was unfair. Further, the Panel did not accept Mr Peter Gold's assertion that the lay bets in the goldylocks account for races 1, 4, 6 and 7 were purely the result of his speed figure information. The Panel found that speed data did not explain the size of the bets on the goldylocks account.

80. We have considered these criticisms of the Panel's specific findings in these two paragraphs. We do not accept that any of these factors and the others which we have not set out are so insignificant that they provide no basis for the Panel's findings that Mr Nick Gold and Mr Peter Gold knew that the lay bets were inspired by inside information. Some can be argued, as we have indicated, both ways. However, all were factors which in our view the Panel were entitled to take into account and to give such weight as they thought proper. For our part, in our view, the fact that neither Mr Nick Gold nor Mr Peter Gold disclosed the existence of their partnership with Mr Sines and Mr Crickmore until in both cases a comparatively late stage is significant. On the basis that their participation in the partnership was entirely innocent we would have expected both Mr Nick Gold and Mr Peter Gold to have been open about it when first notified of the investigation.

81. Two further submissions arising on this ground of appeal need to be considered. Firstly, Mr Caplan relied on the "wider picture" submission made by Mr Bartfeld on behalf of Mr Sines and Mr Crickmore. We have already dealt with this submission insofar as it is relied on by Mr Bartfeld. In our view the comments which we have already made on Mr Bartfeld's submissions apply in similar fashion to Mr Caplan's submissions on this issue. In our judgment the crucial point on this issue is that although both Mr Nick Gold and his father are undoubtedly wealthy men, used to taking large financial risks in their business activities, this is not an explanation for why these bets stand out as extraordinary in respect of the betting accounts held by Mr Nick Gold and Mr Peter Gold.

82. So far as the Golds are concerned, on the issue of the "wider picture" they asserted that in a period from about March to May or June 2009 they lost large sums of money, a total of approximately £400,000. However, no evidence beyond assertion that this occurred was placed before the Panel. Mr Peter Gold said that he thought there were about another 20 lay bets beyond the 10 considered by the Panel. However, in our judgment none of these assertions or submissions provide an answer to Mr Phillips' evidence about the extraordinary betting pattern on the three Gold accounts in respect of races 1 to 7 with which they were concerned.

83. The final submission made on behalf of the Golds was a submissions that the Panel erred in its construction and application of Rule 201(v) of the Rules of Racing. It was submitted that

laying or backing horses whilst in receipt of private or inside information is not necessarily a corrupt or fraudulent practice in breach of the Rules of Racing. Mr Caplan submitted that corrupt or fraudulent conduct must denote criminal conduct which dishonestly prejudices a person's rights or involve bribery or reward. A similar submission was considered by a Board in the appeal of D. McKeown. In the decision in that appeal the Board ruled that it was not necessary to establish a conspiracy to breach the Rules of Racing in any particular way. All that was required was a conspiracy to commit a corrupt practice in relation to Racing (see paragraph 52 of the decision). It also ruled:

“... a regulatory body and its Disciplinary Panel are well placed, given their knowledge of their sport, to interpret such a Rule sensibly, in particular, what is to be regarded as ‘corrupt’ in the context of the sport. See paragraph 55.”

84. The decision of the Board in that appeal was considered by Stadlen J in the High Court (*McKeown v BHA* [2010] EWHC 508). Stadlen J held obiter that this interpretation of the Rule was correct.

85. At paragraph 320 Stadlen J stated:

“In my view proof of a breach of Rule 201(v) does not require proof of the breach of another Rule. As Mr Warby pointed out the Rule applies to ‘any person’ including those who are not subject to the Rules of Racing. Thus to use his example a ring of gamblers who dazzled Race horses with laser pointers by agreement in order to profit by laying them could be in breach of Rule 201(v) and a person subject to the Rules who joined such a conspiracy could be equally in breach of Rule 201(v) irrespective of any other obligation on him under the Rules. Further the fact that in certain circumstances the mere passing of inside information is not a breach of the Rules does not mean that there are no circumstances in which the passing of such information could not constitute a breach of Rule 201(v). For example knowledge of the purpose for which the information is to be used is capable of rendering what might otherwise be conduct permitted by Rule 243, a breach of Rule 201(v).”

86. In our opinion this comment is persuasive against Mr Caplan's submission. In our judgment it was for the Panel to decide whether using inside information to make lay bets was corrupt in the sense that any person involved with Racing would understand. The point was not expressly raised before the Panel, but for our part we have no doubt that on the facts found by the Panel in relation to the Golds, the Panel was entitled to find it was corrupt.

87. We accept that the BHA's case against the Golds was not as strong as its case against Mr Sines and Mr Crickmore. We further accept that the character references produced by them were compelling. The Panel made it clear it took these character references into account. However, on any view the arrangement made by Mr Nick Gold to give credit to Mr Sines and Mr Crickmore to make lay bets on his and his father's account sharing the profits and losses fifty/fifty was, as the Panel described, “remarkable”. The Panel also pointed out that Mr Nick Gold initially

thought Mr Sines a “rough diamond” He knew nothing of Mr Sines’ ability as a gambler on horses other than Mr Sines’ own assertion of his successes. He did know, from experience, that Mr Sines was a very poor poker player. Accepting, as the BHA did, that the Golds are very wealthy men, it nevertheless is difficult to understand why the Golds entered into this remarkable lay betting partnership.

88. Against the background of the lay betting and its success on the seven races with which the Golds were concerned, and the Panel having had the opportunity of observing Mr Nick Gold and Mr Peter Gold give evidence, they found that both men had been aware that the lay betting was inspired by inside information falling short of knowledge of jockeys stopping horses. Taking all the factors into account on which the Panel relied and referred to in their reasons, we have reached the conclusion that there are no grounds for interfering with their decision and the appeals must be dismissed.

The appeal of Kirsty Milczarek

89. Milczarek rode OBE GOLD in the 19.00 race at Lingfield on 15 August 2009: race 10, Annex B. This race was 24 hours after the race at Catterick: race 9. Milczarek had not ridden the horse before and knew nothing about it. It was common ground that the horse could be difficult in the stalls before the race. It was also common ground that the trainer before the race at Lingfield gave instructions to Milczarek over the telephone, not to take off the blindfold until the last moment before the start.

90. The Panel found that Milczarek removed the hood four seconds before the race started. It was put to Milczarek that this was a “pretty extreme mistake” for her to have made and she agreed. The Panel found it was a remarkable mistake “... for such a capable and by then fairly experienced jockey to make. Again, if it was a mistake it is remarkable that it did not stick in her memory and was not disclosed to investigators”.

91. The Panel found that by the time the race started the horse appeared to have settled down. But when the stalls opened the horse dived to the left and “bronced”: a movement shown in the video of the race. This movement caused Milczarek to be slammed into the forward upright of the stall causing a quite severe injury to her shoulder. The Panel went on to find that Milczarek’s injury affected her ride and the Panel “was convinced” that she had not exaggerated her injury. For this reason the Panel rejected the allegation of breach of Rule 157, the horse having finished 5th in the race.

92. The Panel did, however, find that Milczarek deliberately removed the blindfold from the horse early for the purpose of affecting its behaviour and to ensure lay betting succeeded; in short, that Milczarek was a party to the conspiracy, contrary to Rule 201(v). Milczarek appealed against this decision.

93. The Panel’s finding that Milczarek was party to the conspiracy was based on telephone evidence given by John Gardner in respect of this race. Gardner’s evidence, which was not in

dispute, was that Mr Crickmore's telephone records showed 12 calls to Milczarek from him over a period of time including 12, 13 and 14 August. The records further showed that on 13 and 14 August two telephone calls were made by Mr Crickmore to Milczarek. The call on 13 August was followed by a response by Milczarek to Mr Crickmore. We return to the detail of the calls below.

94. The Panel recorded Milczarek's explanations for these calls as follows:

"Her explanation at the Enquiry was that she had not remembered these contacts, but that it was likely that Mr Crickmore was calling her phone to get hold of Fallon. She said Fallon was notorious for not answering his phone."

95. At that time Kieren Fallon was Milczarek's boyfriend. He was serving a period of suspension from riding and Milczarek said he was in the habit of driving her to and from race meetings, particularly when they were double meetings on the same day.

96. The Panel accepted that it was possible that Fallon was driving Milczarek on 12 August but found that the pages of telephone records provided during her evidence indicated that he was not driving her either on 13 or 14 August. The Panel said in their reasons:

"These pages [telephone records] show that on these two days she was texting Fallon at a time when according to her he must have been in the car beside her. The Panel therefore rejected her evidence that her phone call to Mr Crickmore on 13 August was inadvertent and that the incoming call on 14 August was passed on to Fallon. She herself was speaking with him on 14 August on those occasions. Her explanation of the Crickmore calls on those days is rejected as untruthful."

97. The Panel in the next paragraph of their reasons linked the telephone calls with the lay betting for race 10 described as "on an unprecedented scale" for two of the Berkeley Betting Services accounts. In the following paragraph the Panel concluded that:

"In the light of all these matters, the Panel felt compelled to conclude that the early removal of the blindfold by Milczarek was not a mistake but deliberate. It was calculated to hinder the prospects of OBE GOLD in the Race."

98. The notice of appeal against this decision raised four grounds of appeal. The first is the ground common to the other Appellants, namely that the Panel adopted the wrong standard of proof when reaching its findings. We have dealt with this ground earlier in our reasons. The second ground of appeal alleged that the Panel's findings were based on insufficient evidence. The third ground was based on an application for leave to adduce "new evidence". Initially leave was sought to adduce evidence from an expert in race riding to deal with the removal of the blindfold. This was abandoned and needs no further mention. The second was an application for leave to adduce the evidence of Kieren Fallon. The fourth ground of appeal concerns the issue of whether the Panel could properly infer from all the evidence that Milczarek had accepted a

reward for her actions in the conspiracy.

99. We start with the second ground of appeal. Mr Winter pointed out what he submitted were a number of material errors in the Panel's reasons and unreasonable findings. Firstly, Mr Winter submitted that the Panel's comments about Milczarek's evidence as to when and why she removed the blindfold was inaccurate or at least implied, wrongly, that Milczarek had not revealed to investigators that it was a mistake for her to have removed the blindfold too early.

100. At the hearing before the Board, Mr Warby submitted that in her evidence before the Panel Milczarek had changed her version of how she came to remove the blindfold too early. We have viewed the video and carefully reviewed Milczarek's answers in her interview with Jon Dunn. The interview took place on 27 November 2009 before Milczarek had seen the video. In answer to questions from Dunn, Milczarek described what had happened, stating that she took the "blinds off" when the starter said, "Jockeys ready, blinds off". She went on to describe the delay before the stalls opened. Dunn complimented her on giving her explanation before she was shown the DVD.

101. In evidence, during cross-examination, Milczarek having by then seen the video, recognised that she had made a mistake in saying that it was the starter who said "Blinds off". She recognised that it must have been the assistant starter who had said, "Gates shut" or some other words. As we record above, the Panel said that it was remarkable that this was not disclosed to the investigators.

102. In our view this comment by the Panel was a little harsh. Milczarek had, as Dunn commented at the end of the interview, told him what had happened. It appears that it was not until she saw the DVD that she realised she had made a mistake in saying that it was the starter who caused her to take off the blindfold. However, we recognise that at the end of this paragraph of the Panel's decision (paragraph 161) the Panel added that mistakes may be forgotten or not owned up to for reasons unrelated to corrupt behaviour. On its own, this submission by Mr Winter in our view is of no real significance.

103. Secondly, Mr Winter submitted that there is an error in the Panel's reasoning in paragraphs 162 and 163 of their decision. It is submitted that the Panel was wrong to rely on the fact that Milczarek had made no reference to the telephone calls between her, Fallon and Mr Crickmore in her Schedule (A)6 form. Mr Winter pointed out that at the time she completed that form the BHA had not disclosed the telephone records.

104. The above raises a crucial issue in this appeal. When the BHA did disclose telephone records amongst them were records of Mr Crickmore's telephone calls. It was from these records that Milczarek based her explanations for the telephone calls to her from Mr Crickmore and their connection with Fallon. It was a combination of her records and Mr Crickmore's telephone records that formed a material part of Milczarek's case. Her case was that Mr Crickmore's calls to her were attempts by him to get in touch with Fallon. The Panel rightly observed that



Milczarek's comments on these records were not disclosed to the BHA before the hearing. Understandably the Panel commented that her explanations owed more to convenient reconstruction than genuine recall. We are aware that shortly before the hearing there was some correspondence between the parties and the Chairman of the Panel about further statements. No order was made for further statements but in our opinion it would have been appropriate and far better if Milczarek's advisers had disclosed what her evidence was to be in respect of these records. Howsoever this may be, the telephone records are an important feature in Milczarek's appeal.

105. The Panel accepted Milczarek's evidence that the telephone records showed contacts between Mr Crickmore, Milczarek and Fallon and that these gave some credence to Milczarek's assertion that when Mr Crickmore telephoned her he was endeavouring to get hold of Fallon. But, as the Panel pointed out, the crucial telephone calls were those showing contact between Mr Crickmore and Milczarek on 13 and 14 August. These telephone calls and Milczarek's evidence in respect of them can properly be described as pivotal to the Panel's decision. The Panel, as we have indicated, found that Milczarek had lied in her explanations for them on the basis that Fallon could not have been with her when the calls were made and could not have spoken to Mr Crickmore on these occasions.

106. We come now to the application for Fallon's evidence to be adduced before the Board. With the consent of both counsel we heard this evidence without prejudice to the BHA's submission that this evidence did not satisfy the requirements of Schedule (A)7 paragraphs 21 and 22. Fallon gave evidence to the Board by telephone from Dubai, where he had racing commitments.

107. Fallon readily accepted that by reference to the telephone evidence he could not have driven Milczarek to Salisbury on 13 August 2009. In his witness statement dated 12 February 2012 he had said it was unlikely that he had driven her on that day. Milczarek herself had said she thought that he had done so. It is obvious to us that Fallon did not drive her on that day.

108. Milczarek's evidence was that on that day she had received a missed call and had responded because she thought it might be in relation to her business. The records show her return call to Mr Crickmore lasted only 1 minute 30 seconds. It is not shown in Mr Gardner's statement on his schedule as a telephone call which is related to race 10. That is perhaps not surprising. It was made two days before race 10. This latter point is not conclusive on the issue of whether or not it concerned race 10, but in our judgment the fact that Milczarek was wrong in relation to her supposition that Fallon may have driven her on that occasion does not materially undermine her evidence that her short conversation with Mr Crickmore had nothing to do with the Lingfield race. It is certainly not sufficient on which to base a conclusion that because she was wrong in stating Fallon was with her on that occasion, she was lying about the contents of the call.

109. Further, we do not think it significant that Milczarek did not mention this or the call on the following day in her interview with Jon Dunn. At that time she had not seen the telephone evidence and she may very well have forgotten these two telephone calls. In the same interview

she had not disguised that she knew Mr Crickmore.

110. On 14 August Fallon said that he believed he did drive Milczarek to Newbury for her afternoon Race and back to Newmarket for her Race at the evening meeting. His evidence to the Board was that he remembered the Race at Newbury in which Milczarek rode, because she was on a good horse in a Race which was important to her career. He said that he would have gone to the centre of the course to practice his golf, but he remembered watching the Race from the rails. He thought Milczarek had not been as tactically wise in the Race as she could have been and he was disappointed for her.

111. On the basis that he was in the car on that day he said they were probably on the road back to Newbury from Newmarket at 16.45 when Mr Crickmore's call was made. The call lasted 1 minute 55 seconds. He said he had no memory of it, but Mr Crickmore often spoke to him about horses.

112. Fallon was cross-examined about the length of time it took him to drive from Newbury to Newmarket. He said he could do the journey in 2 hours or less. It was suggested to him by Mr Warby that on the basis of the telephone records he could not have driven from Newmarket to Newbury in the early afternoon and back again in the late afternoon.

113. Fallon agreed that apart from his recollection of the Race in which Milczarek rode at Newbury he was unable to say that he was at Newbury on that day. He accepted he had not looked at any telephone or other records to see whether or not they supported his assertion that he went to Newbury on 14 August. He did not keep a diary and he was uncertain whether the two of them went in his or Milczarek's car. He said that text messages did not demonstrate that he was not in the car because if they stopped at service stations Milczarek would text him asking him to buy something for her to eat or drink, or for some other reason. Of the text at 17.40 he said he could not recall it but they could have been at Newmarket by then or they could have stopped at a garage when she texted him.

114. Mr Warby submitted that Fallon's evidence was not capable of belief and it could, and should, have been adduced at the hearing before the Panel.

115. We found Fallon's evidence difficult to assess. His answers were at times vague and discursive. We do not, however, find it surprising that he looked at none of his records, if he had any, to determine whether or not he had driven to Newbury on 14 August. He was not approached before his witness statement of 12 February 2012 and it is unsurprising that his evidence was vague on detail. However, we were impressed by his evidence that he remembered the Race at Newbury. We do not find that this part of his evidence was untruthful. On the contrary, we accept this part of his evidence as truthful and accurate in the sense that he did watch the race.

116. Mr Winter pointed out that Milczarek's telephone records for 14 August show a gap

between 12.54 and 15.52. This is consistent with Milczarek being involved in a journey to Newbury, the race at 15.30, and her return to Newmarket after the race. We find that Fallon was in the same car as Milczarek on 14 August and was probably the driver.

117. The timings for the journeys to and from Newbury given by Fallon are, however, in our opinion, a little unrealistic, particularly his assertion that they were back in Newmarket by 17.40 when Milczarek is recorded as making a text to his number. However, on Fallon's evidence, it is least possible that it was a text by Milczarek to Fallon on an occasion when they had stopped on the journey home.

118. In the circumstances we are satisfied that Fallon's evidence satisfies Schedule (A)7 paragraph 22.3.2. We have, however, been troubled as to whether it satisfies Schedule (A)7 paragraph 22.3.1. Mr Winter submitted that Fallon's evidence only became important on the Panel's finding that he was not in the car with Milczarek when Mr Crickmore telephoned her at 16.45.

119. We were not impressed by this submission. In our view, it ought to have been foreseen by Milczarek's legal advisers that Fallon's evidence would or might support her case, which was that Mr Crickmore only telephoned her when he wanted to get hold of Fallon and that he had spoken to Fallon at 16.45 on 14 August. The Schedule, however, provides that such evidence can be admitted by the Board in exceptional circumstances (paragraph 22.3).

120. Before we go any further we return to the BHA's case that the telephone calls on 13 and 14 August were what Mr Winter described as "conspiratorial" calls. We have already expressed our opinion that the telephone call on 13 August is insufficient on its own to be described as a conspiratorial call. The telephone call at 16.45 on 14 August was just less than two minutes in duration. It occurred on the day before the Race. Mr Gardner's evidence and his schedules do not link it with the lay bets placed on race 10. They appear to have been placed on the following day in the late afternoon. The call from Mr Crickmore to Vasey just after the 15.45 telephone call on 14 August in our opinion could just as easily have been a call in connection with the lay betting on OBE GOLD at Catterick that evening. We accept that the substantial nature of the lay betting is an indication of confidence that the horse would not win. But, as Mr Winter submitted, inside information in relation to race 10 could have come from some source other than Milczarek.

121. It follows from the above that the 16.45 call on Milczarek's telephone is only significant if the explanation that it was for Fallon was a deliberate lie. We entirely understand and take into account that the Panel heard Milczarek's evidence and we did not. Nevertheless, in our opinion, even without Fallon's evidence, we find that the factors relied upon by the Panel were in the circumstances not sufficient to permit the inference being drawn that she was part of the alleged conspiracy.

122. The telephone call at 16.45 was a single call of short duration. It is possible that it could have been a call by Mr Crickmore for Fallon even if Fallon was not in the car at the time. The

text to Fallon at 17.40 could have been made on the journey back to Newmarket during a break in the journey. Milczarek was at the time a young jockey of good character with every reason not to jeopardise her career.

123. In our judgment there was insufficient evidence to support the Panel's conclusion that Milczarek was party to the conspiracy. Although it is not strictly necessary for our decision to allow the appeal, we would if necessary have admitted Fallon's evidence under the exceptional circumstances provision in Schedule (A)7 paragraph 22.3. This evidence reinforces our conclusion.

124. We should add that in our opinion it will be rare for a Board to allow new evidence under the "exceptional circumstances provision". In this case, Milczarek was not asked by either counsel for the BHA or the Panel for her explanation of the text and telephone calls other than the 16.45 telephone call. In particular, the text by her to Fallon at 17.40 on 14 August was never put to her for explanation. We can understand that the records upon which all the calls were based were only explained at the hearing. Mr Warby said that he was granted a short adjournment to consider these records, but he accepted he did not cross-examine Miss Milczarek on the 17.40 text which appears to have been the crucial text so far as the Panel's was concerned.

125. For these reasons the Panel's finding that Milczarek was a party to the conspiracy cannot stand and her appeal succeeds. In view of our decision on grounds 2 and 3 of the notice of appeal it is unnecessary for us to refer to or deal with ground 4.

## APPEALS AGAINST PENALTIES

1. Sines, Crickmore, Nick Gold and Peter Gold appeal against the penalties imposed on them by the Panel. Mr Sines and Mr Crickmore, as registered owners, were subject to disqualification. The Panel imposed on them disqualification for periods of 10 years for breach of Rule 201(v) and 4 years consecutive for breach of Rule 247, a total of 14 years. Mr Nick Gold and Mr Peter Gold were subjected to exclusion orders under Rule (A)64 of 7 years and 5 years respectively. It is submitted on behalf of all of these appellants that the penalties imposed on them were too severe.

2. In sentencing Mr Sines and Mr Crickmore the Panel described the conspiracy as serious and extensive. It went on to say that both men were the main "movers in organising" the conspiracy and that the number of "cases" was a serious aggravating feature.

3. It was submitted on behalf of these two men that the penalties were more than four times the prescribed starting points for these breaches. Further it was submitted that the Panel was not justified in making the 4 year period for breach of Rule 247 consecutive to the period of 10 years. This was all part and parcel of the conspiracy.

4. In our opinion the Panel was right to stress the extent and seriousness of this conspiracy. It

spanned a period of approximately eight months and involved substantial lay betting. The consecutive sentence of 4 years for lay betting on a horse which they owned marked a serious aggravating feature. We see nothing wrong in principle with either the length of the orders of disqualification or the fact they were made consecutive to each other. However, the Panel in their reasons drew attention to the involvement of Milczarek as a “particularly unhappy corruption”. We have allowed Milczarek’s appeal and for that reason we make a small reduction of 1 year to the 10 year period of disqualification. The total period of disqualification in each case is therefore 13 years.

5. Leading counsel representing Mr Nick and Mr Peter Gold submitted that the periods of exclusion in the case of each of the Golds were too long. He pointed out that the entry point for a breach of Rule 201(v) is 3 years and the range 6 months to 10 years. He submitted that the periods of exclusion for each of the Golds should be no more than 6 months.

6. In our view the roles played by both Golds in this conspiracy were significant. They did not know that the jockeys had been suborned into stopping horses but the Panel found that they had acted on the basis that the lay bets were made with the confidence of inside information short of stopping horses. In addition they provided the facility for Mr Sines and Mr Crickmore to make their lay bets. This activity was spread over seven races.

7. We regard the suggestion that their penalties should be no more than 6 months as unrealistic. It was in our opinion inevitable that the Panel should make exclusion orders for a substantial length of time. However we take into account that we have reduced the period of disqualification for Mr Sines and Mr Crickmore. Although the Golds were not involved in race 10 this reduction has some effect on their penalties. We also take into account the penalties in respect of the other bettors of which the longest was the 5 year exclusion order of Vasey. To give effect to these considerations we propose to reduce the period of exclusion for Mr Nick Gold to 5 years. But we do not propose to make any reduction of Mr Peter Gold’s exclusion order. At the hearing before the Board it was made clear to us that Mr Nick and Mr Peter Gold were “as one”. The Panel did not give a reason for differentiating between the two Golds. No doubt they must have thought Mr Nick Gold led his father into this activity. We take the view that although that may be so, Mr Peter Gold could have stopped his son from being involved in this conspiracy but chose not to do so. In the circumstances we regard their conduct as on the same level of seriousness and we make no reduction in the length of the period of Mr Peter Gold’s exclusion order.

8. We add the following comment in respect of all four of the bettors. The penalties on Mr Nick Gold and Mr Peter Gold may to some seem harsh. But this conspiracy and particularly the conduct of Mr Sines and Mr Crickmore struck at the heart of the integrity of Racing. It must be made clear to all those who contemplate taking part in this sort of conspiracy, in whatever capacity, that they must expect that the penalties for doing so will be severe.

Sir William Gage, Lord Rathcreedan, Anthony Mildmay-White  
10 April 2012